VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 498

IN THE MATTER OF CRIMINAL CONTEMPT OF
THOMAS C. McCONNELL, PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 14, 1961
CERTIORARI GRANTED DECEMBER 11, 1961

In the

United States Court of Appeals

For the Seventh Circuit

No. 13160

APPENDIX

VOLUME I

INDEX

PAGE

Statement required by Rule 12(c) of the Rules of the United States Court of Appeals for the Seventh Circuit 1

Placita, June 1960 Term 3

Complaint, filed February 16, 1956 4

Motion of Defendants Railroad Transfer Service, Inc., and John L. Keeshin, to dismiss the plaintiff's complaint and to strike certain parts of complaint, filed April 23, 1956 23

Answer of Hugh W. Cross to the complaint, filed April 25, 1956 26

Motion to dismiss of The New York Central Railroad Co., filed April 25, 1956 31

Stipulation and attached thereto: Copy of Motion to dismiss and in the alternative to strike certain parts of complaint, filed by certain defendants, filed September 2, 1960 (Original filed April 25, 1956) 32-33

Memorandum of the Court, filed September 19, 1956 .. 38

Order entered on September 9, 1956, denying motion to dismiss as to each defendant and each defendant granted 30 days from this date to answer complaint 44

Answer of John L. Keeshin and Railroad Transfer Service, Inc., filed October 19, 1956 44

Answer of Defendant Railroad Presidents and certain defendant Railroads filed October 19, 1956 59

Answer of Defendant, The New York Central Railroad Co., filed October 19, 1956 66

Pleadings (abstracted) 71-74

Order entered on August 1, 1958 denying motion of plaintiff to set a trial date etc. 74

PAGE

Plaintiff's list of documents filed on September 25, 1958 75

List of documents of Hugh W. Cross, Defendant, filed October 10, 1958 94

List of documents of defendant Railroads and Railroad Presidents, filed October 20, 1958 95

Notice and attached thereto: List of documents of The New York Central Railroad Company, filed October 22, 1958 102

List of documents of John L. Keeshin, and Railroad Transfer Service, Inc., Defendants, filed November 3, 1958 103

Objections of Defendant Hugh W. Cross, to plaintiff's list of documents, filed November 3, 1958 104

Objections of Plaintiff to the admission in evidence of documents appearing on the list of defendant Railroads and Railroad Presidents, filed November 3, 1958 105

Objections of defendant Railroads and Railroad Presidents to documents included in plaintiff's list, filed November 4, 1958 107

Objections of defendants John L. Keeshin, and Railroad Transfer Service, Inc. to plaintiff's list of documents, filed November 5, 1958 133

Motion of Defendant Railroads and Railroad Presidents to strike plaintiff's list of documents and in the alternative for pre-trial rulings, filed January 30, 1958 134

Adoption and joinder by John L. Keeshin, et al., in motion of defendant Railroads et al., to strike plaintiff's list of documents etc., filed February 11, 1959 .. 137

Adoption and Joinder by Hugh W. Cross, defendant in motion and brief on behalf of Railroads et al., to strike list of plaintiff's re documents etc., filed March 4, 1959 138

PAGE

Transcript of Proceedings held May 11, 1959, Colloquy and statements by counsel on pre-trial conference 141-254

Motion for leave to file amendments to complaint Attached thereto: Amendments to complaints, filed May 14, 1959 255-258

Order entered on May 14, 1959 granted leave to plaintiff to file its amendments to complaint instanter 259

Answer of defendant Railroad Presidents and certain of defendant Railroads to complaint as amended, filed May 14, 1959 260

Answer of defendants John L. Keeshin, et al., to amendments to complaint, filed May 25, 1959 261

Answer of defendant, The New York Central to certain amendments to the complaint, filed June 3, 1959 .. 262

Order entered on June 10, 1959, granting plaintiff leave to file its motions for partial summary judgment instanter and that defendants file their opposition thereto instanter 263

Motion of plaintiff for partial summary judgment, filed June 10, 1959 264

Opposition to plaintiff's motions of June 10, 1959, filed June 10, 1959 269

Affidavit of E. B. Padrick filed by defendants Railroads et al., in opposition to plaintiff's motion for summary judgment, filed June 30, 1959 271

Affidavit of Edward Bayr, filed August 12, 1959 281

Affidavit of Aaron Kazanow, filed August 12, 1959 285

Order entered on November 12, 1959, directing that transcript in re pre-trial conference of May 11, 1959 be filed 287

Transcript of Proceedings held November 30, 1959— hearing on motion for summary judgment 287-291

PAGE

Order entered on November 30, 1959, denying plaintiff's motion for summary judgment 292

Transcript of Proceedings held January 6, 1960—Discussion on the Court's Memorandum 292-353

Memorandum of the Court entered December 4, 1959 on defendants' motions to strike plaintiff's list of documents and in the alternative for pre-trial rulings, filed March 10, 1960 353

Memorandum and Order entered thereon, filed March 10, 1960 374

Transcript of Proceedings commencing April 14, 1960 385
Appearances 385
Colloquy 386-396, 423-432, 437-439, 442-452, 549-552, 571-576, 578-612, 625-636, 658-667, 687-689, 731-738, 835-838, 880-884, 931-950, 956-961, 969-972, 984-994, 999-1029, 1100-1115, 1175-1177, 1401-1403, 1554-1557, 1561-1563, 1584-1592, 1717-1723
Colloquy re Exhibits 1035-1099
Colloquy re Instructions 1599-1617
Statement by Mr. McConnell 297-415, 1583,1596
Statement by Mr. Thompson .....
.....415-419, 950-956, 1030-1033, 1389-1400, 1593-1596
Statement by Mr. Meserow 419-421, 832-834
Statement by the Court 432-436, 439-442, 1597
Statement by Mr. Freeman 994-998
Interrogation and Examination of Prospective Jurors 453-502
Opening statement on behalf of plaintiff by Mr. McConnell 503-512
Opening statement on behalf of Defendants John L. Keeshin and Railroad Transfer Service, Inc., by Mr. Meserow 513-520
Opening statement on behalf of defendant Hugh W. Cross, by Mr. Owens 520-521
Opening statement on behalf of defendant Railroads by Mr. Thompson 521-543
Opening statement on behalf of defendant, The New York Central Railroad, by Mr. Keating ..543-545

Instructions, refused 1617-1621

PAGE

Closing Argument on Behalf of Plaintiff by Mr. McConnell 1621-1655

Closing Argument on Behalf of Defendants by Mr. Meserow 1655-1660

Closing Argument on Behalf of Defendants by Mr. Thompson 1600-1699

Closing Argument on Behalf of Plaintiff by Mr. McConnell 1700-1708

Court's Charge to the Jury 1709-1716

Order entered on May 3, 1960, overruling defedants' motion that Court direct jury to return a finding for defendants 1724

Verdict, filed May 10, 1960 1725

Order entered on May 10, 1960, judgment on the verdict and holding Thomas C. McConnell and Lee A. Freeman in contempt 1725

Order entered on May 12, 1960, an ing orders entered May 10, 1960 1726

Memorandum Opinion of the Court, filed June 30, 1960 1728

Final Judgment entered on June 30, 1960 1754

Notice of Appeal of Plaintiff, and attached thereto: Clerk's certificate of mailing, filed July 20, 1960 1756

Pleadings (abstracted) 1758

Certificate of Clerk, dated October 18, 1960 1758

WITNESSES

For Plaintiff:

Charles E. Quackenbush (Deposition)—
Direct Examination by Mr. Freeman ..547-570, 576

Paul E. Feucht (Adverse)—
Direct Examination by Mr. Freeman 612

PAGE

Hugh W. Cross (Adverse)—
Direct Examination by Mr. Freeman 637

Raymond T. Anderson (Adverse)—
Direct Examination by Mr. Freeman 640, 644
Interim Cross Examination by Mr. Thompson 643
Cross Examination by Mr. Thompson 653

Gerald E. Duffy (Adverse)—
Direct Examination by Mr. Freeman 655

P. H. Sullivan (Deposition)—
Direct Examination by Mr. Stevens 667
Cross Examination by Mr. Tone 684
Redirect Examination read by Mr. McConnell 684

Howard E. Simpson (Deposition)—
Direct Examination by Mr. Stevens 690-730

Fred G. Gurley (Deposition)—
Direct Examination by Mr. Freeman 739
Cross Examination by Mr. Thompson 751
Redirect Examination by Mr. Freeman 753

For Defendants:

Fred G. Gurley—
Redirect Examination by Mr. Thompson ....
.....754, 774, 778, 782
Recross Examination by Mr. McConnell ....
.....766, 776, 778

For Plaintiff:

Stanley F. G. Nelson (Adverse)—
Direct Examination by Mr. Freeman 783, 829
Cross Examination by Mr. Thompson 866
(recalled)
Cross Examination by Mr. Thompson 891
Cross Examination by Mr. Meserow 903
Cross Examination by Mr. Keating 907
Redirect Examination by Mr. Freeman .. 909

PAGE

Benjamin F. Goldstein—
Direct Examination by Mr. Freeman 884

Albert A. Wilbur—
Direct Examination by Mr. Freeman 962

Frank L. Monaco—
Direct Examination by Mr. Freeman 972

For Defendants:

Earl B. Padrick—
Direct Examination by Mr. Thompson ..1116, 1178
Direct Examination by Mr. Meserow 1198
Cross Examination by Mr. McConnell 1200
Redirect Examination by Mr. Thompson 1267
Recross Examination by Mr. McConnell 1272

Morris Markin (Deposition)—
Examination read by Mr. Thompson 1273

John F. Whittington—
Direct Examination by Mr. Thompson 1281
Cross Examination by Mr. McConnell 1301
Redirect Examination by Mr. Thompson 1347, 1353
Recross Examination by Mr. McConnell 1351

Edward Bayr—
Direct Examination by Mr. Meserow 1353
Cross Examination by Mr. McConnell 1364
Redirect Examination by Mr. Meserow 1380
Recross Examination by Mr. McConnell 1384

For Plaintiff—In Rebuttal:

Herbert B. Lazarus—
Direct Examination by Mr. McConnell 1405
Cross Examination by Mr. Thompson 1407

Albert J. Meserow—
Direct Examination by Mr. McConnell 1413
Cross Examination by Mr. Thompson 1416
Redirect Examination by Mr. McConnell 1419

PAGE

John J. Keeshin (Deposition)—
Direct Examination by Mr. McConnell 1420

Richard E. Coleman (Deposition)—
Direct Examination by Mr. Freeman 1421

Charles E. Quackenbush (Deposition)—
Direct Examination by Mr. Freeman 1431

Felix A. Krock—
Direct Examination by Mr. Freeman 1445
Cross Examination by Mr. Thompson 1458
Cross Examination by Mr. Meserow 1469
Redirect Examination by Mr. Freeman 1474

William A. Scheeder—
Direct Examination by Mr. McConnell 1475
Cross Examination by Mr. Thompson 1500
Redirect Examination by Mr. McConnell 1540
Recross Examination by Mr. McConnell 1559

For Defendants in Surrebuttal:

Walter R. Deitreich—
Direct Examination by Mr. Thompson 1564
Cross Examination by Mr. McConnell 1568
Redirect Examination by Mr. Thompson 1576

John E. Bares—
Direct Examination by Mr. Thompson 1576
Cross Examination by Mr. McConnell 1580

APPENDIX.

1

In The United States District Court

(Caption—No. 56 C 323)

STATEMENT REQUIRED BY RULE 12(c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. The style of the court and the title of this case are as shown in the above heading.

2. This action was commenced on February 16, 1956 by the filing of the complaint.

3. The names of the parties hereto are as follows:

(a) *Plaintiff-Appellant*: Parmelee Transportation Company, a Delaware Corporation.

(b) *Defendants-Appellees*: John L. Keeshin, Hugh W. Cross, Howard E. Simpson, Paul E. Feucht, Wayne A. Johnston, Fred G. Gurley, Railroad Transfer Service, Inc., a Delaware Corporation, the Atchison, Topeka and Santa Fe Railway Company, a Kansas Corporation, The Baltimore and Ohio Railroad Company, a Maryland Corporation, Chicago and North Western Railway Company, a Wisconsin Corporation, Illinois Central Railroad, an Illinois Corporation, The New York Central Railroad Company, an Illinois, New York, Ohio, Indiana, Pennsylvania and Michigan Corporation, The Pennsylvania Railroad Company, a Pennsylvania Corporation, and John Doe.

4. The several dates when the respective pleadings were filed are as follows:

Plaintiff's complaint filed February 16, 1956; Amendments to Complaint filed May 14, 1959. Answers to complaint and the amendments to complaint were respectively filed as follows:

(a) Hugh W. Cross on April 25, 1956 (complaint only).

(b) John L. Keeshin and Railroad Transfer Service, Inc., on October 19, 1956 and May 25, 1959.

(c) Howard A. Simpson, Paul E. Feucht, Wayne A. Johnston, Fred G. Gurley, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago, and North Western Railway Company, Illinois Central Railroad, and The Pennsylvania Railroad Company on October 19, 1956 and May 14, 1959.

(d) The New York Central Railroad Company on October 19, 1956 and June 9, 1959.

5. No defendant was arrested, no bail was taken, and no property was attached.

6. Time when the trial was had: The trial took place before the court and jury on April 26, 27, 28, 29, May 2, 3, 4, 5, 6, 9, 10, 1960.

7. Name of the trial judge: Honorable Julius H. Miner.

8. Nature of verdict rendered by the jury:

Jury verdict for defendants on special interrogatory with respect to the issue of public injury.

9. Date of final judgment: June 30, 1960.

10. Notice of appeal, together with bond for costs, filed July 20, 1960.

Parmelee Transportation Company,
a Delaware Corporation,
By *Thomas C. McConnell*
Thomas C. McConnell

Lee A. Freeman
Lee A. Freeman
Herbert B. Lazarus
Herbert B. Lazarus
Its Attorneys

Thomas C. McConnell,
McConnell, Paschen & Curtis,
134 South LaSalle Street,
Chicago 3, Illinois
Lee A. Freeman,
105 South LaSalle Street,
Chicago 3, Illinois
Herbert B. Lazarus,
1790 Broadway,
New York, New York

3 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of June, being the 6th day thereof, in the Year of Our Lord One Thousand Nine Hundred Sixty and of the Independence of the United States of America, the 184th Year.

Present:

Honorable William J. Campbell, Chief District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Julius J. Hoffman, District Judge
Honorable Julius H. Miner, District Judge
Honorable Edwin A. Robson, District Judge

Also Present:

Honorable Albert B. Maris,	Senior United States Circuit Judge for the Third Circuit
Honorable Omer Poos,	United States District Judge for the Southern District of Illinois
Honorable John J. Kilkenny,	United States District Judge for the District of Oregon

sitting pursuant to designation.
Roy H. Johnson, Clerk
William W. Kipp, Sr., Marshal
Thursday, June 30, 1960
Present: Honorable Julius H. Miner,
Trial Judge

4

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

5 COMPLAINT
(Filed Feb. 16, 1956)

PARMALEE TRANSPORTATION COMPANY, a Delaware Corporation, Plaintiff, by its attorneys, brings this action against the defendants, and complains and alleges as follows:

I.

JURISDICTION.

1. This complaint is filed and proceedings are instituted against the defendants under §§ 4 and 16 of the Act of Congress of October 15, 1914, Chap. 323, 38 Stat. 6 731 and 737, as amended, entitled "An Act to Supplement Existing Laws against Unlawful Restraints and

Monopolies, and for Other Purposes", commonly known as the Clayton Act, 15 U.S.C. §§ 15 and 26, in order to recover the damages sustained by plaintiff by reason of the defendants' violations of §§ 1 and 2 of the Act of Congress of July 2, 1890, Chap. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, 15 U.S.C. §§ 1 and 2, and to have injunctive relief against said unlawful conduct by defendants.

2. By virtue of § 14 of the Clayton Act, 15 U.S.C. § 24, the violations of the Sherman Act by the corporations hereinafter described are deemed also to be violations by the individual directors, officers, or agents of such corporations who authorized, ordered, or did any of the acts constituting in whole or in part such violations.

II.

PLAINTIFF.

3. Plaintiff is a Delaware corporation, qualified to do business in Illinois, with its principal place of business in Chicago, Illinois.

III.

DEFENDANTS.

4. John L. Keeshin (hereinafter called "Keeshin") resides in River Forest, Illinois. Keeshin organized, controls and is one of the directors of Railroad Transfer Service, Inc.

5. Hugh W. Cross (hereinafter called "Cross") resides in Jerseyville, Illinois. He was a member of the Interstate Commerce Commission from April 11, 1949 until November 23, 1955, and was Chairman of the Interstate Commerce Commission from July 1, 1955 until November 23, 1955.

6. Howard E. Simpson (hereinafter called "Simpson") resides in Baltimore, Maryland. He is the president and a director of The Baltimore and Ohio Railroad Company.

7. Paul E. Feucht (hereinafter called "Feucht") resides in Barrington, Illinois. He is the president and a director of the Chicago and North Western Railway Company.

8. Wayne A. Johnston (hereinafter called "Johnston") resides in Flossmoor, Illinois. He is the president and a director of the Illinois Central Railroad.

9. Fred G. Gurley (hereinafter called "Gurley") resides in Winnetka, Illinois. He is the president and a director of The Atchison, Topeka and Santa Fe Railway Company.

10. Railroad Transfer Service, Inc. (hereinafter called "Transfer") is a Delaware corporation with its principal place of business in Chicago, Illinois. Transfer was formed for the purpose of effectuating the conspiracy hereinafter described.

11. Each of the following defendant corporations (hereinafter called "defendant railroads") owns and operates a railroad having a terminus in Chicago, Illinois, transacts business and is found in the Northern District of Illinois:

(a) The Atchison, Topeka and Santa Fe Railway Company is a Kansas corporation.

(b) The Baltimore and Ohio Railroad Company is a Maryland corporation.

8 (c) Chicago and North Western Railway Company is a Wisconsin corporation.

(d) Illinois Central Railroad is an Illinois corporation.

(e) The New York Central Railroad Company is an Illinois, New York, Ohio, Indiana, Pennsylvania and Michigan corporation.

(f) The Pennsylvania Railroad Company is a Pennsylvania corporation.

12. The defendant WESTERN RAILROAD PASSENGER ASSOCIATION, CHICAGO TERMINAL LINES (formerly known as Western Passenger Association, Chicago Terminal Lines and hereinafter called the "RAILROAD ASSOCIATION") is an unincorporated voluntary association of railroads whose lines terminate in Chicago and of depot corporations with railroad terminals in Chicago, organized for the purpose, among others, of dealing with terminal and passenger and baggage transfer problems and procedures in the Chicago terminal area. The RAILROAD ASSOCIATION transacts business and is found in the Northern District of Illinois. Its members consist of the following twenty-one railroads:

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Chesapeake and Ohio Railway Company
Chicago and Eastern Illinois Railroad Company
Chicago and North Western Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, North Shore and Milwaukee Railway
Chicago, Rock Island and Pacific Railroad Company
Chicago, South Shore and South Bend Railroad
Erie Railroad Company
Grand Trunk Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company
The New York Central Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Wabash Railroad Company

and the following three depot corporations:

The Baltimore and Ohio Chicago Terminal Railroad Company

The Chicago and Western Indiana Railroad Company

The Chicago Union Station Company

(The railroads and depot corporations forming the Western Railroad Passenger Association, Chicago Terminal Lines will hereinafter be referred to as "Chicago Terminal Lines".)

13. On information and belief it is alleged that John Doe and other persons to the plaintiff presently unknown were parties to the conspiracy hereinafter alleged and should be made defendants to this action after their identity becomes known.

10 IV.

NATURE OF TRADE AND COMMERCE INVOLVED.

14. There are eight railroad stations in the city of Chicago at which persons board or disembark from trains engaged in interstate passenger transportation. The connecting railroads involved in such interstate trips through Chicago in most instances do not operate into the same terminal station in said city. A large number of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one of said eight railroad stations and travel to another station some two blocks to two miles distant in order to board another train. The transportation and transfer of such passengers and their baggage from and between railroad stations in Chicago is hereinafter referred to as "station transfer service".

15. In addition, each day large numbers of persons making interstate railroad trips arrange for the pick-up of their trunks and other baggage at points within the Chicago metropolitan area for transport to outgoing rail-

road stations where they are checked through to destinations; and conversely a large number of such persons arrange for the delivery of such trunks and other baggage after interstate railroad trips, from incoming railroad stations to points of destination within the Chicago metropolitan area. These services will hereinafter be referred to as "pick-up and delivery service".

16. The business of transporting such passengers and their baggage from and between stations in Chicago and of providing pick-up and delivery service is part of the trade or commerce among the several states protected by §§ 1 and 2 of the Sherman Act.

17. A passenger making an interstate railroad trip through Chicago customarily contracts with one railroad for a single joint fare to cover the entire trip, including the cost of transporting the passenger and his baggage in Chicago from the incoming train to the outgoing train. Railroad tickets issued for such trips through Chicago include transfer coupons for station transfer service. For over one hundred years the defendant railroads and their predecessors have paid other persons to perform this station transfer service for them.

18. Prior to June 1, 1955, any person willing and able to perform this station transfer service was free to negotiate with the railroads for this business, and the railroads were free to contract with the person or persons who offered to provide satisfactory station transfer service at the lowest cost.

19. The character and cost of the services performed by persons engaged in the business of transporting interstate railroad passengers and their baggage from or between railroad stations in Chicago and of performing pick-up and delivery service in the Chicago metropolitan area for interstate trips are matters in which the traveling public has a pecuniary interest. Increases in the cost of such services ultimately will increase the passenger's cost

of interstate rail transportation. Any decrease in the quality or extent of such services is prejudicial to the interests of the traveling public.

20. Extensive station transfer and pick-up and delivery services were operated by plaintiff in Chicago. Such services were originally established by Frank Parmelee in 1853. Prior to September 30, 1955, each of the Chicago Terminal Lines engaged plaintiff or its predecessors and others to perform station transfer services. In an effort at all times to provide adequate service at the lowest cost, and thus to offer the railroads and the traveling public a better bargain than its competitors or potential com-
12 petitors could offer, the plaintiff and its predecessors designed and acquired special vehicles, buildings and other facilities, built special structures at depots, hired and trained personnel in specialized skills, and from time to time invested substantial sums of money in order to maintain and improve the character of plaintiff's operations, all for the purpose of meeting the special requirements of the Chicago Terminal Lines, including the defendant railroads, and of the traveling public. Throughout this period of over 100 years, the plaintiff and its predecessors engaged in this business, and provided the railroads and the traveling public with dependable service. Plaintiff is ready, willing and able, and has offered to continue to engage in the station transfer and pick-up and delivery business on terms and conditions favorable to the railroads and to the traveling public, but has been prevented from so doing from and after September 30, 1955 by the conspiracy hereinafter described.

21. In addition to station transfer and pick-up and delivery services, plaintiff performed various other services for the railroads and the traveling public. Plaintiff derived revenue and profit from the performance of these other services.

22. The outstanding history of efficient and reliable service performed by plaintiff and its predecessors for more than a century in Chicago caused persons throughout the country to become familiar with the name "Parmelee" as a symbol of a type of transportation known for its integrity, efficiency and fair dealing. Prior to September 30, 1955, the good will and reputation associated with the name "Parmelee" was unique and enabled plaintiff to earn substantial sums of money in the operation of its aforesaid business. Plaintiff's property right in the good will attached to said name and reputation prior to September 30, 1955 was of great monetary value.

13 23. On or about March 1951, the Railroad Association established a committee consisting of the six defendant railroads and delegated to said committee the authority and responsibility of reviewing the cost to the Chicago Terminal Lines of providing motor vehicle station transfer service, of soliciting motor vehicle operators in addition to plaintiff to submit proposals to render station transfer and pick-up and delivery services, and of negotiating with such operators on behalf of the Chicago Terminal Lines, all for the purpose of keeping down the cost to the railroads of providing such services. Said six defendant railroads accepted said delegation of authority, and agreed to report their recommendations to said Chicago Terminal Lines from time to time.

24. During 1951 and thereafter until the conspiracy hereinafter alleged was formed and effectuated, said defendant railroads, acting on behalf of the Chicago Terminal Lines, from time to time did solicit and negotiate with various motor vehicle operators with respect to the rendition of station transfer and pick-up and delivery services, and did find that plaintiff was willing and able to provide said services at a lower cost and on more favorable terms and conditions than any competitor or potential competitor of plaintiff.

25. Prior to October 1, 1955, neither KEESHIN, CROSS nor TRANSFER had ever engaged in the rendition of station transfer or pick-up and delivery services in Chicago or elsewhere.

14 V.

POWERS AND DUTIES OF MEMBERS OF THE INTERSTATE COMMERCE COMMISSION.

26. The Interstate Commerce Commission, (hereinafter sometimes referred to as "Commission") created and established by Act of Congress, is vested with comprehensive regulatory powers over the operations of interstate railroads, motor carriers, water carriers and other forms of public tansportation. All of the Chicago Terminal Lines, including the defendant railroads, are subject to the aforesaid regulatory jurisdiction of the Commission. Within the past five years matters of great importance to the defendant railroads and to the public have been pending before and have been decided by the Commission, and matters of great importance to the defendant railroads and to the public may by law be brought before the Commission for decision or action at any time.

27. The operation of motor vehicle station transfer services in the Chicago terminal area pursuant to contract with the railroads is exempt from the Commission's regulatory authority except with respect to maximum hours of employee work.

28. Under the declared policy of Congress, and usages and regulations developed by the Commission, members of the Commission are under a duty to avoid private dealings with railroads which would impair their ability to deal impartially with persons subject to the jurisdiction of said Commission.

29. In consequence, defendant CROSS, while a member of the Commission was under a duty to refrain from influ-

encing or attempting to influence any representative of the defendant railroads to do business with, or to refuse to do business with, any person engaged in or seeking to engage in the business of station transfer and pick-up and delivery services in Chicago.

30. Each of the other defendants well knew of the aforesaid duty and obligation of defendant Cross as a member of the Commission, and each of said other defendants was under a duty to refrain from offering or promising defendant Cross anything of value to induce him to breach his duties as a member of the Commission and to refrain from attempting to influence defendant Cross to do, or omit to do, or fail to do impartially, any act in his official capacity, by granting private requests made by, or by furthering the personal interests of, said defendant Cross.

VI.

OFFENSES CHARGED.

31. Prior to March 15, 1955, and continuing to and including the date of the filing of this complaint, defendants, together with other persons to the plaintiff unknown, have been and are now engaged in an unlawful combination, conspiracy and concert of action to eliminate all competition for contracts or arrangements with the railroads and depot corporations comprising the Chicago Terminal Lines to transport interstate passengers and their baggage from or between railroad stations, or between railroad stations and steamship docks in Chicago, to eliminate all competition for the rendition of pick-up and delivery services, to foreclose all future competition for such contracts and services, and to restrain and monopolize the aforesaid interstate commerce in violation of §§ 1 and 2 of the Sherman Act.

32. Prior to March 15, 1955, and continuing thereafter, defendants, Cross, Keeshin and persons to the plaintiff

unknown conceived, planned, entered into and participated in said combination, conspiracy and concert of action, among the substantial terms of which have been and are: that Cross, in exchange for Keeshin's promise of a valuable consideration and in violation of his aforesaid duties, would influence, induce and persuade defendants Simpson, Feucht, Johnston and Gurley, and through them the defendant railroads and the defendant Railroad Association, to join and participate in said unlawful combination, conspiracy and concert of action by representing to them that he would benefit personally and derive value therefrom at a future date and that he would continue to exercise his powers as a member of the Commission until such future date; that defendants Simpson, Feucht, Johnston and Gurley and the defendant railroads, well knowing that it was improper and illegal for defendant Cross to attempt to persuade any of them to do so and in order to induce Cross to give favorable consideration and to refrain from giving unfavorable consideration to matters of importance to defendant railroads which were then pending or which might by law be brought before the Commission, would cause the Chicago Terminal Lines to eliminate plaintiff from the business of performing station transfer and pick-up and delivery services for them in Chicago and to grant an exclusive five year contract to a corporation to be formed by defendant Keeshin, regardless of whether the cost and terms proposed by Keeshin for such services were less favorable than could be obtained by them as a result of free competition for such contract; and that the defendant Transfer would be organized by Keeshin pursuant to and in order to carry out and effectuate said unlawful combination, conspiracy and concert of action and would participate therein.

33. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and other persons to the plaintiff unknown, by agreement and

concert of action, have done the things which, as here-
17 inbefore alleged, they conspired to do, including but not limited to the following acts:

(a) Between March 15, 1955 and June 13, 1955, defendants KEESHIN and CROSS and other persons to the plaintiff unknown, conferred with one another repeatedly in order to work out the terms and conditions of the aforesaid conspiracy and the methods of accomplishing its objectives.

(b) During said period, defendant CROSS conferred with defendants SIMPSON, JOHNSTON and FEUCHT and induced them to cause defendant railroads, and through them the Chicago Terminal Lines, to discontinue their business dealings with plaintiff without reasonable cause, and to accept a proposal for a five-year exclusive contract with a corporation to be formed and designated by defendant KEESHIN.

(c) On or about June 1, 1955, defendants SIMPSON, FEUCHT, JOHNSTON and GURLEY, as well as other executives of defendant railroads, caused their subordinates and representatives on said committee of six railroads to recommend to and thus cause the Chicago Terminal Lines to accept the proposal submitted by defendant KEESHIN and to cease doing business with plaintiff regardless of whether plaintiff proposed to continue to do business with the Chicago Terminal Lines at a lower cost and on terms more favorable to them than could be obtained from KEESHIN or any competitor or potential competitor of the plaintiff.

(d) On June 13, 1955, agents of the six defendant railroads met with the representatives of the other railroads and depot corporations comprising the Chicago Terminal Lines and recommended the elimination of plaintiff from the business of rendering station transfer and pick-up and delivery services in
18 Chicago and the acceptance of an exclusive five year

contract with a corporation to be formed by KEESHIN. By reason of the authority delegated to the committee of six defendant railroads to deal with the Chicago transfer problems, the recommendation thus made was relied upon and accepted by the other railroads and depot corporations comprising the Chicago Terminal Lines and plaintiff was notified by the RAILROAD ASSOCIATION that its services in Chicago would no longer be used after September 30, 1955.

(e) On or about July 25, 1955, defendant TRANSFER was incorporated.

(f) On or about September 15, 1955, acting for and on behalf of the Chicago Terminal Lines, Earl B. Padrick, as their agent, executed a contract dated as of October 1, 1955, granting TRANSFER the exclusive privilege of transporting passengers and baggage between stations and of performing the pick-up and delivery service in Chicago for a fixed term ending September 30, 1960 on terms and conditions more costly and less favorable to said railroads than could have been obtained from plaintiff. Said agreement did not accord any of the Chicago Terminal Lines the free and unrestrained right to take independent action with respect to any matter covered by the agreement.

(g) By said agreement of September 15, 1955, the Chicago Terminal Lines, including defendant railroads, agreed that it was their collective purpose and intention to the maximum extent possible to limit the entire field of passenger and baggage transportation between railroad terminal stations and between railroad terminal stations and steamer docks in Chicago exclusively to TRANSFER, and to act in concert to recommend and refer all their passengers and prospective passengers to TRANSFER, as the sole and exclusive baggage transport service which could be relied upon for

prompt, safe, satisfactory and economical baggage transfer service in the Chicago terminal area. Such collective undertaking was made when none of the Chicago Terminal Lines including the defendant railroads had any knowledge as to whether TRANSFER would or could merit such reference and recommendation by them and when they all knew that plaintiff did merit favorable reference and recommendation by reason of past services.

(h) On or about September 29, 1955 TRANSFER qualified to do business in Illinois, but did not, and still has not, obtained the public passenger vehicle licenses required by the City of Chicago for companies operating terminal vehicles for the transportation of passengers between railroad stations in the Chicago terminal area. Since October 1, 1955, TRANSFER has used vehicles and has conducted its operations in a manner that violated and now violates the safety requirements of the Chicago Public Passenger Vehicle Ordinance (Chapter 28 of the Chicago Municipal Code).

(i) On October 1, 1955, pursuant to said contract, TRANSFER entered upon the business of transporting passengers and their baggage between railroad terminal stations in Chicago and of performing pick-up and delivery service in the Chicago metropolitan area. Such business was commenced and the services are being conducted by TRANSFER with only a nominal capital investment. The services performed by TRANSFER pursuant to said contract have been and are more costly to said railroads and less extensive and valuable than the services previously performed by plaintiff and which plaintiff had offered to continue to perform.

(j) Since October 1, 1955, the defendant railroads have employed all available means including the violation of shippers' instructions to divert baggage pick-up and delivery business to TRANSFER and away from

plaintiff, and otherwise to interrupt and impede the offering and rendition of plaintiff's public transportation services.

(k) On and after October 1, 1955, the defendant railroads and the other railroad and depot corporations comprising the Chicago Terminal Lines, have given defendant TRANSFER extensive assistance in the rendition of station transfer and pick-up and delivery services, by granting defendant TRANSFER financial aid and utilization of railroad employees and facilities at an expense and cost to the railroads involved and at an advantage and savings of cost and expenses to TRANSFER, which far exceeded the aid and assistance previously afforded plaintiff or which would have been afforded plaintiff if it had continued to do business with the Chicago Terminal Lines.

(l) Prior to November 23, 1955, defendant CROSS did exercise his power as a member and as Chairman of the Commission in favor of other defendants in matters pending before and subjects over which the Commission had supervision.

(m) On November 23, 1955, defendant CROSS resigned his position as Chairman of the Commission as a result of an investigation of his conduct by the United States Senate Committee on Government Operations, Permanent Subcommittee on Investigations and prior to the announced institution of public hearings by said Subcommittee. Such resignation was for the purpose of concealing the terms of the conspiracy.

21

VII.

EFFECTS OF THE CONSPIRACY.

34. The combination and conspiracy hereinbefore alleged have had as intended by the defendants, the following effects, among others:

(a) Competition for the business of transporting interstate passengers and their baggage from and between railroad stations in Chicago has been substantially eliminated and plaintiff has been improperly excluded from and deprived of the opportunity of fairly competing for such business;

(b) Competition for the business of transporting interstate passengers and their baggage between railroad stations and steamer docks in Chicago has been foreclosed;

(c) Competition for the business of pick-up and delivery of baggage and related transportation services in the Chicago metropolitan area has been unduly restrained;

(d) The Chicago Terminal Lines have entered into a contract to pay TRANSFER a higher price over the next five years for the performance of station transfer services and on terms less favorable than the price and terms at which plaintiff had offered to perform said services;

(e) The services being performed by TRANSFER pursuant to said contract are less extensive and valuable than the services previously performed by plaintiff, and which plaintiff had offered to continue to perform;

(f) Unlawful restraints have been and are now being imposed upon plaintiff in connection with the business of transporting non-coupon holding pas-
22 sengers from and between railroad terminal stations, and of performing the pick-up and delivery of baggage and other services;

(g) The RAILROAD ASSOCIATION and the defendant railroads in furtherance of said combination and conspiracy, have been and now are wrongfully impairing the reputation of plaintiff with the public for satisfactory passenger and baggage transfer services;

(h) The RAILROAD ASSOCIATION and the defendant railroads acting in concert in furtherance of said combination and conspiracy, are aiding and abetting TRANSFER in the commercial operation over the streets and public ways of Chicago of unlicensed terminal vehicles in violation of the Chicago Municipal Code; and in the use of vehicles and their operation contrary to the safety requirements of said Chicago Municipal Code;

(i) The ability of defendant Cross to perform his official duties in a fair, impartial and efficient manner was impaired and the public and the Commission were substantially deprived of the value of defendant Cross' services.

35. By reason of the unlawful acts of the defendants herein complained of, and as a result of said conspiracy and combination to restrain and monopolize interstate trade and commerce in the business of furnishing station transfer and pick-up and delivery services in Chicago, plaintiff has been grievously injured and damaged in its business and property. Plaintiff has been deprived of substantial profits which it would have earned in its business of transporting passengers and their baggage from and between railroad terminal stations and performing the pick-up and delivery of baggage service and other related services if competition for such business in Chicago had not been unlawfully restrained and monopolized by
23 the defendants as aforesaid. The good will and value of plaintiff's aforesaid business as a going concern and the business reputation associated with the name "Parmelee" have been substantially and permanently impaired and injured. Plaintiff has been subjected to substantial operating losses in the conduct of its aforesaid business since October 1, 1955. Plaintiff has sustained actual damage in its business and property by reason of defendants' violations of the antitrust laws in excess of

Six Million Four Hundred Thousand Dollars ($6,400,000.00). Plaintiff's total damages, being treble damages as provided in the Clayton Act, are in excess of Nineteen Million Two Hundred Thousand Dollars ($19,200,000.00).

36. The aforesaid conspiracy is continuing, and will continue to cause irreparable loss and damage to the plaintiff and to the public unless equitable relief is granted. No complete and adequate remedy at law exists.

WHEREFORE, the plaintiff asks that summons issue against the defendants named herein, requiring them and each of them to appear in answer to this complaint within the time fixed by the rules of this Court and that after a hearing on the issues joined:

(A) A joint and several judgment be entered against the defendants in the total amount of Nineteen Million Two Hundred Thousand Dollars ($19,200,000.00) in favor of plaintiff;

(B) In addition thereto there be allowed by the Court to plaintiff its reasonable attorneys' fees and cost of suit as provided by statute;

(C) The aforesaid combination and conspiracy in restraint of trade and conspiracy to monopolize be adjudged and decreed to be unlawful, and each of the
24 defendants be perpetually enjoined and restrained from continuing the aforesaid combination, conspiracy and concert of action;

(D) Said contract entered into on September 15, 1955 be declared to be illegal and of no force and effect;

(E) Plaintiff have such further, general and different relief as the nature of the case may require and the Court may deem proper in the premises.

/s/ Lee A. Freeman

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Chicago 3
ANdover 3-6939
Attorney for Plaintiff,
PARMELEE TRANSPORTATION COMPANY

HERBERT B. LAZARUS
1501 Broadway
New York 36, New York
JOHN PAUL STEVENS
105 South LaSalle St.
Chicago 3, Illinois.
Of Counsel

Jury Demand.

The plaintiff pursuant to Rule 38 of the Rules of Civil Procedure for the District Courts of the United States demands a trial by jury of all issues tendered by the above and foregoing complaint, except the issue of whether or not the plaintiff is entitled to the equitable injunctive relief prayed.

/s/ Lee A. Freeman
LEE A. FREEMAN
Attorney for Plaintiff.

25

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

MOTION OF DEFENDANTS RAILROAD TRANSFER SERVICE, INC., A CORPORATION AND JOHN L. KEESHIN, TO DISMISS THE PLAINTIFF'S COMPLAINT TO STRIKE CERTAIN PARTS OF COMPLAINT.

(Filed April 23, 1956)

Now come the defendants Railroad Transfer Service, Inc., a corporation and John L. Keeshin by Albert J. Meserow, their attorney and moves to dismiss the complaint of Parmalee Transportation Company, plaintiff, and as grounds for such motion states:

1. The complaint fails to state any claim upon which relief can be granted for the reason that:

A. It affirmatively appears in said complaint that Railroad Transfer Service, Inc. a corporation did not come into existence until to-wit July 25, 1955, which was long after the award of the contract by the railroads to the defendant Keeshin, on June 13, 1955 and long after any alleged conspiracy took place; that it
26 did not start in business until October 1, 1956, long after any alleged conspiracy took place.

B. The allegations of said complaint fail to show any combination or action whereby the defendants monopolized or attempted to monopolize any part of the trade or commerce, in the transfer of passengers and baggage between stations in the terminal area of Chicago.

C. The complaint fails to allege any facts which show a combination or action whereby the defendants have unreasonably restrained interstate commerce.

D. The allegations of said complaint do not charge any combination conspiracy or restraint, in violation of the laws of the United States prohibiting Monopo-

lies and Combinations in Restraint of Trade such as to interfere with the interests of the public.

E. The said complaint fails to show that the alleged conspiracy was unlawful or illegal, nor does it set forth any allegations that show that the alleged concerted action was accomplished by unlawful means.

F. The granting of the privilege to Keeshin by the
27 railroads to transfer baggage and passengers between stations in the Chicago terminal area, was a lawful exercise of the rights of the defendants and is not in contravention of the Clayton Act or the Sherman Anti-Trust Act.

G. The complaint fails to set forth any allegations that show that the public interest has in any way been prejudiced.

H. That it affirmatively appears in said complaint that the railroads were free to contract with any person for the service of interstation transfer of passengers and baggage and that the railroads did in fact solicit bids from plaintiff and others, as well as defendant Keeshin; and that their decision to award the contract to Keeshin was the result of free and open competition and not in restraint of trade.

I. That the plaintiff is estopped from complaining against the defendants, because, if as plaintiff alleges, the operation of the transfer service by defendant Keeshin constitutes a monopoly and is in restraint of trade, as alleged by plaintiff, then plaintiff who carried on this service for a period of 102 years, is guilty of monopoly and restraint of trade, and it is therefore estopped from complaining of defendants in this cause.

28 J. That paragraphs 16, and 19, are mere conclusions and do not allege facts pertinent to the alleged cause of action.

K. That the clauses of the fourth sentence of paragraph 20, are immaterial.

L. That paragraph 21 is immaterial in that it does not factually describe the alleged "various other services" referred to, or state facts showing said services are in interstate commerce or affect interstate commerce.

M. That paragraph 22 does not set forth facts, but rather self-serving statements which are immaterial.

N. The allegations is paragraph 24 are a conclusion and argumentative.

O. The allegations of paragraphs 26 through 30 are immaterial.

P. The allegations of paragraph 31 are mere conclusions.

Q. That the allegations contained in paragraph 32 are vague, indefinite and are conclusions.

R. That paragraphs 33, (a), (b), (e), (f), (g), (h), (i), (k), and (l) and paragraph 36, are vague, and argumentative and contain legal conclusions and should be stricken.

S. There are no facts alleged which justify relief in equity by injunction.

29 T. That said complaint is in all other respects infirm and does not set forth any cause of action against the defendants.

Wherefore these defendants pray that the complaint of plaintiff be dismissed.

Albert Jameson
Attorney for Railroad Transfer
Service, Inc., a corporation and
John L. Keeshin, defendants

Albert J. Meserow
231 South LaSalle Street
Chicago 4, Illinois
State 2-8500

30

In The United States District Court

* * (Caption—No. 56 C 323) * *

ANSWER.

(Filed April 25, 1956)

Now comes the defendant, Hugh W. Cross, by his attorneys, Charles F. Hough, William F. Coale, Jr. and Louis A. Witry, and in answer to the complaint says as follows:

First Defense.

The complaint fails to state a claim upon which relief can be granted.

Second Defense.

This defendant, without in any way waiving the benefit of the First Defense herein pleaded, but because of the fact that he was a public official and that there are serious but untrue charges made against him and others in the complaint, has in addition to the foregoing First Defense elected to answer such charges made in the complaint.

1-2. Defendant denies the conclusions of law contained in paragraphs 1 and 2 of the complaint insofar as said conclusions relate to the facts set forth in the complaint.

31 3-4. Defendant admits that Keeshin resides in River Forest, Illinois, but neither admits nor denies the other allegations contained in paragraphs 3 and 4 of the complaint for the reason that he has no knowledge sufficient to form an opinion or belief as to the truth of these allegations.

5-6. Defendant admits the allegations contained in paragraphs 5 and 6 of the complaint.

7. Defendant denies the allegations contained in paragraph 7 of the complaint except that he does admit that Paul E. Feucht was formerly president of the Chicago and North Western Railway Company and that he resides in Barrington, Illinois.

8-9. Defendant admits the allegations contained in paragraphs 8 and 9 of the complaint.

10. Defendant neither admits nor denies the allegation of paragraph 10 of the complaint that Railroad Transfer Service, Inc. is a Delaware corporation and that it has its principal place of business in Chicago, Illinois, for the reason that he is without knowledge sufficient to form a belief as to the truth thereof. Defendant denies the allegation of paragraph 10 of the complaint that Railroad Transfer Service, Inc. was formed for the purpose of effectuating the alleged conspiracy and states that no such conspiracy ever existed.

11. Defendant admits that each of the corporations named in paragraph 11 of the complaint owns and operates a railroad having a terminus in Chicago, Illinois,
32 transacts business and is found in the Northern District of Illinois; but he neither admits nor denies the allegations as to the state or states of incorporation of any of said corporations for the reason that he is without knowledge sufficient to form a belief as to the truth thereof.

12. Defendant neither admits nor denies the allegations contained in paragraph 12 of the complaint for the reason that he is without knowledge sufficient to form a belief as to the truth thereof.

13. Denying that the alleged conspiracy ever existed, he denies the allegations of paragraph 13.

14. Defendant admits the allegations contained in paragraph 14 of the complaint.

15. Defendant neither admits nor denies the allegations contained in paragraph 15 of the complaint for the reason that he is without knowledge sufficient to form a belief as to the truth thereof.

16. Defendant neither admits nor denies the conclusions of law contained in paragraph 16 of the complaint.

17. Defendant neither admits nor denies the allegations in paragraph 17 of the complaint for the reason that he is

without knowledge sufficient to form a belief as to the truth thereof, but he does know generally that the situation is approximately as alleged. Defendant further states that taxicabs and other types of motor vehicles have been and are engaged in transporting passengers and baggage between railroad terminals in the City of Chicago.

18. Defendant neither admits nor denies the conclusions contained in paragraph 18 of the complaint for the reason that he is without knowledge sufficient to form a belief as to the truth thereof.

19-20. Defendant neither admits nor denies the allegations contained in paragraphs 19 and 20 of the complaint because of the various conclusions, implications and ramifications contained therein upon which this defendant would have to speculate, and therefore states that he has not sufficient knowledge upon which to form a belief, but denies the repeated conclusions of a conspiracy.

21. Defendant neither admits nor denies the allegations contained in paragraph 21 of the complaint for the reason that he is without knowledge sufficient to form a belief as to the truth thereof.

22. Defendant denies the allegations contained in paragraph 22 of the complaint. He avers that he has been informed and verily believes and upon such information and belief charges that there were a substantial number of railroads as well as many individual travelers who were dissatisfied with the service being performed by plaintiff.

23-24. Defendant neither admits nor denies the allegations contained in paragraphs 23 and 24 of the complaint for the reason that he is without knowledge sufficient to form a belief as to the truth thereof, but he again specifically denies that the alleged conspiracy ever existed.

25. Defendant admits that he had never engaged in the rendition of station transfer or pick-up and delivery services in Chicago or elsewhere prior to October 1, 1955, and

further states that he has never engaged in the rendition of said services on or since that date. Defendant neither admits nor denies the other allegations contained in paragraph 25 of the complaint for the reason that he is without knowledge sufficient to form a belief as to the truth thereof.

26. Defendant admits the allegations contained in paragraph 26 of the complaint.

27. Defendant neither admits nor denies the conclusions of law contained in paragraph 27 of the complaint.

28-30. Paragraphs 28, 29 and 30 of the complaint are mere conclusions of the plaintiff and do not properly belong in the complaint, but defendant desires to answer these allegations even though they are not properly pleaded. Defendant states that he is and was at all times keenly aware of his duties, obligations and responsibilities as a member of the Interstate Commerce Commission and that he conducted himself in a proper manner at all times; and particularly that he was never offered anything of value or otherwise relating to the transaction involved herein, nor did he request or expect any such thing. He denies all insinuations and innuendoes set forth in paragraphs 28, 29 and 30.

31. Defendant denies the allegations, and each of them, contained in paragraph 31 of the complaint.

32. Defendant denies the allegations, and each of them, contained in paragraph 32 of the complaint. Without limiting the general denial, he denies specifically that there was ever any combination, conspiracy or concert of action between himself and any other person or persons, that he agreed to or ever did influence, induce or persuade or attempt to influence, induce or persuade any person or persons to enter into any combination, conspiracy or concert of action, that he received any promise of a valuable consideration from Keeshin or from any other person or persons, and that at any time he acted in violation of his duties as a member of the Interstate Commerce Commission.

33. Defendant denies that the alleged conspiracy ever existed and denies the allegations contained in subparagraphs (a) and (b) of paragraph 33 of the complaint. Defendant neither admits nor denies the allegations contained in subparagraphs (c), (d), (e), (f), (g), (h), (i), (j), and (k) of paragraph 33 of the complaint for the reason that he is without knowledge sufficient to form a belief as to the truth thereof. Defendant denies the scandalous and impertinent allegations contained in subparagraph (l) of paragraph 33 of the complaint. Defendant admits that on November 23, 1955, he resigned from the Interstate Commerce Commission, as alleged in subparagraph (m), but he denies that such resignation was the result of any
36 investigation by the United States Senate Committee on Government Operations, Permanent Subcommittee on Investigations, and denies that such resignation was for the purpose of concealing the terms of any alleged conspiracy.

34. Defendant denies that the alleged conspiracy ever existed and denies the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), and (i) of paragraph 34 of the complaint.

35-36. Defendant denies the allegations contained in paragraphs 35 and 36 of the complaint and that plaintiff is entitled to any judgment, injunction or other relief.

Wherefore, defendant Hugh W. Cross prays that judgment be entered in his favor and against the plaintiff.

Charles F. Hough
Charles F. Hough
William F. Coale, Jr.
William F. Coale, Jr.
Louis A. Witry
Louis A. Witry
Attorneys for Defendant
Hugh W. Cross

231 S. La Salle St.
Chicago 4, Illinois
FRanklin 2-1270

37

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

MOTION TO DISMISS.
(Filed April 25, 1956)

The New York Central Railroad Company, one of the defendants in the above cause, by its attorneys, moves the court to dismiss the complaint for failure to state a claim upon which relief can be granted and as grounds for said motion says:

1. The complaint does not contain sufficient allegations of fact to state a cause of action under Section 1 of the Sherman Act, 15 U.S. Code, Title 15, Section 1.
2. The complaint does not contain sufficient allegations of fact to state a cause of action under Section 2 of the Sherman Act, 15 U.S. Code, Title 15, Section 2.
3. The complaint fails to allege facts showing injury to the general public, which allegations are essential to establish a cause of action under the Sherman Act.
4. The complaint fails to allege sufficient facts against this defendant to state a cause of action for conspiracy under the Sherman Act.

Wayne M. Hoffman
Alvin B. Bush
Attorneys for Defendant
The New York Central Railroad Company
By Wayne M. Hoffman

Marvin A. Jersild
R. J. Murphy
R. O. Olson

38

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

Filed Stipulation and attached thereto: Copy of Motion to dismiss and in the alternative to strike certain parts of complaint, filed by certain defendants (Original filed April 25, 1956)

STIPULATION
(September 2, 1960)

The parties hereto, by their respective attorneys, stipulate and agree that the attached Motion to Dismiss and in the Alternative to Strike Certain Parts of Complaint filed by certain defendants is a true and complete copy of the original thereof filed in the above entitled cause on April 25, 1956.

Marvin A. Jersild RD
Marvin A. Jersild
Martin J. Keating RD
Martin J. Keating
Attorneys for Defendant
New York Central Railroad Company
Joseph C. Owens
Joseph C. Owens
Attorney for Defendant
Hugh W. Cross
Albert J. Meserow
Albert J. Meserow
Jerome F. Dixon
Jerome F. Dixon
Attorneys for Defendants
John L. Keeshin and Railroad Transfer Service, Inc.

Thomas C. McConnell
Thomas C. McConnell
Lee A. Freeman
Lee A. Freeman
Herbert B. Lazarus
Herbert B. Lazarus
Attorneys for Plaintiff,
Parmelee Transportation Company
Floyd E. Thompson by RP
Floyd E. Thompson
Philip W. Tone by REP
Philip W. Tone
Attorneys for certain railroads and railroad presidents, defendants

39

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

MOTION TO DISMISS AND IN THE ALTERNATIVE TO STRIKE CERTAIN PARTS OF COMPLAINT

Now come defendants, Howard E. Simpson, Paul E. Feucht, Wayne A. Johnston, Fred G. Gurley, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago and North Western Railway Company, Illinois Central Railroad and The Pennsylvania Railroad Company, by their attorneys, Floyd E. Thompson, Albert E. Jenner, Jr. and Philip W. Tone, and move to dismiss the complaint as to these defendants, and each of them, for failure to state a claim upon which relief can be granted, and for grounds of said motion show:

1. The complaint does not state facts which show a violation of Section 1 of the Sherman Act, 15 U.S. Code, Title 15, Section 1.

2. The complaint does not state facts which show a violation of Section 2 of the Sherman Act, U.S. Code, Title 15, Section 2.

40 3. The gist of the complaint is that the contract between "Chicago Terminal Lines and Railroad Transfer Service, Inc. was induced by improper influence brought to bear upon these defendants by a member of the Interstate Commerce Commission. The complaint does not state an offense under either Section 1 or Section 2 of the Sherman Act, but at most alleges a violation by a public official of his duties and obligations as such and knowledge of defendants of such alleged violation.

4. The complaint does not allege facts showing that these defendants conspired among themselves or with others to restrain trade or commerce in violation of Section 1 of the Sherman Act, or to monopolize any part of trade or commerce in violation of Section 2 of the Sherman Act, but on the contrary merely charges these defendants with

yielding to the influence and inducements of a member of the Interstate Commerce Commission in awarding the subject contract to Railroad Transfer Service, Inc.

5. The details of the alleged conspiracy, which appear in paragraph 32, not only fail to show a conspiracy in restraint of trade or a conspiracy to monopolize any part of trade proscribed by Sections 1 and 2 of the Sherman
41 Act, but the matters and things alleged show that no such conspiracy existed. The alleged "terms" of the combination or conspiracy considered singly or together so not state or tend to state a violation of Section 1 or of Section 2 of the Sherman Act.

6. "Chicago Terminal Lines" had the undoubted right to contract with Railroad Transfer Service, Inc. rather than Parmelee Transportation Company for the subject services. Plaintiff's complaint is not that the contract with Railroad Transfer Service, Inc., covering the business of "station transfer service" and "pick-up and delivery service," is exclusive in character, but rather than an exclusive contract to perform the subject services was not awarded to plaintiff.

7. No facts are alleged which show that there are restraints upon trade or monopolistic practices by these defendants, or any of them, injurious to the purchasers or users of the "station transfer service" and the "pick-up and delivery service" covered by the challenged contract, or resulting in other public injury. The facts alleged show that the challenged contract is a legal contract, and one in the public interest and not one proscribed by the Sherman Act.

And in the alternative these defendants move to strike from the complaint the following:

42 8. The matter stated in paragraph 16 is not statement of fact but is statement of mere legal conclusion.

9. Paragraph 19, and each sentence thereof, is specula-

tive, conclusional and argumentative in character, and does not allege facts pertinent to the cause of action sought to be stated.

10. The clauses of the fourth sentence of paragraph 20, "in an effort at all times to provide adequate service at the lowest cost, and thus to offer the railroads and the traveling public a better bargain than its competitors or potential competitors could offer," are mere puffing and are immaterial and impertinent.

11. Paragraph 21 is immaterial and impertinent in that it does not describe the alleged "various other services" referred to or state facts showing said services are in interstate commerce or affect interstate commerce; and, further, in that it is not alleged that said services have any relation to the matters complained of in the complaint.

12. Paragraph 22, and each and every part thereof, consists of mere self-serving and self-laudatory statements which are immaterial and impertinent. No facts are stated in the paragraph which show or tend to show or are related to a violation of the antitrust law.

13. The matter in the clause "and did find that plaintiff was willing and able to provide said services at a lower cost and on more favorable terms and conditions than any competitor or potential competitor of plaintiff" in paragraph 24 is immaterial and impertinent and is conclusional and argumentative.

14. The allegation of paragraph 25 is immaterial and impertinent.

15. All of the matter stated in Division V of the complaint, paragraphs 26 to 30, is immaterial and impertinent, and is scandalous in its implications. No facts are alleged in this division, or any part thereof, which show or tend to show or are related to a violation of the antitrust laws.

16. The matter stated in paragraph 31 is not statement of fact but is mere conclusion of the pleader.

17. The clauses "in exchange for Keeshin's promise of a valuable consideration and in violation of his aforesaid duties" and "by representing to them that he would benefit personally and derive value therefrom at a future date and that he would continue to exercise his powers as a member of the Commission until such future date" and "well knowing that it was improper and illegal for defendant Cross to attempt to persuade any of them to do so and in order to induce Cross to give favorable con-
44 sideration and to refrain from giving unfavorable consideration to matters of importance to defendant railroads which were then pending or which might by law be brought before the Commission" and "regardless of whether the cost and terms proposed by Keeshin for such services were less favorable than could be obtained by them as a result of free competition for such contract" appearing in paragraph 32 are, and each of them is, impertinent and scandalous and are designed to create prejudice against these defendants and contribute nothing to the pleading of the cause of action which plaintiff attempts to state.

18. The matters and things alleged in subparagraphs g, h, i, j, k, l and m of paragraph 33 are impertinent and immaterial. None of the facts alleged in these subparaparagraphs, paragraphs, or any of them, show or tend to show a violation of the antitrust laws, and the conclusions stated have no support in the alleged facts. The clause "regardless of whether plaintiff proposed to continue to do business with the Chicago Terminal Lines at a lower cost and on terms more favorable to them than could be obtained from Keeshin or any competitor or potential competitor of the plaintiff" and the clause "on terms and conditions more costly and less favorable to said railroads than could have been obtained from plaintiff" and the sentence "Said
45 agreement did not accord any of the Chicago Terminal Lines the free and unrestrained right to take inde-

pendent action with respect to any matter covered by the agreement." are, and each of them is, impertinent and scandalous and none of the alleged matter is material to the cause of action sought to be stated by plaintiff.

19. The matters and things alleged in subparagraphs d, e, f, g, i and j, and each of them, of paragraphs 34 are impertinent and immaterial. None of the facts stated in said subparagraphs show or tend to show a violation of the antitrust laws, and the conclusions stated have no support in the alleged facts.

20. The clause "and the business reputation associated with the name 'Parmelee'" in the third sentence of paragraph 35 is impertinent and immaterial.

21. The facts alleged show that the conspiracy to induce the termination of the arangement with plaintiff and the entering into a contract between the Chicago Terminal Lines and Railroad Transfer Service, Inc., charged in the complaint, is completed and no facts are alleged which justify relief in equity by injunction. Paragraph 36 states no ground for equitable relief, and this paragraph 46 and prayers C, D and E should be stricken.

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Attorneys for said defendants

Of Counsel
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11 South LaSalle Street
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Tel. Ra. 6-0220

47

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

MEMORANDUM

(Filed September 19, 1956)

48 This is a civil anti-trust action to recover damages, and for an injunction, under Title 15 U.S.C., Sections 15 and 16, based on alleged violations of the Sherman Act, specifically Title 15 U.S.C. Sections 1 and 2. The plain-
49 tiff is a transportation company; defendants, so far as it is necessary to enumerate them for the purposes of the present discussion, are: railroad companies with terminals in Chicago; individuals who are presidents of railroads; a former member and chairman of the Interstate Commerce Commission; Chicago Terminal Lines, a voluntary association of railroads whose lines terminate in Chicago; and Railroad Transfer Service, a corporation. The case is now before the Court for a ruling on defendants' motion to dismiss the complaint for failure to state a cause of action.

Sections 1 and 2 of Title 15 forbid respectively "conspiracy in restraint of trade or commerce among the several states," and combining or conspiring to "monopolize any part of trade or commerce among the several states"; recovery of damages and the obtaining of an injunction by any person injured by a violation of these sections is authorized by sections 15 and 26 of the same Title.

The interstate commerce with which the complaint is concerned is the business of transporting from one to another of the eight railroad stations in Chicago passengers and baggage in the process of interstate journeys. That this service is "clearly a part of the stream of interstate commerce" and protected by the Sherman Act has been affirmed by the Supreme Court (*United States* v. *Yellow Cab Co.*, 332 U.S. 218, 228 (1947). The complaint alleges

that for over a century before March, 1955, although
50 there was competition for this market, plaintiff Parmelee Company and its predecessors had consistently offered better and cheaper service than any of its competitors, and had accordingly been hired to and did supply it, year after year, to the satisfaction of the defendant railroads and the traveling public. In the spring and summer of 1955 this fortuitous situation was terminated by the intervention of a conspiracy on the part of the defendants.

The nature and effect of this conspiracy, as described in the complaint, were briefly as follows: Hugh W. Cross became a member of the Interstate Commerce Commission in April 1946, and was its chairman from July 1, 1955, until his resignation on November 23, 1955. Before March, 1955, John L. Keeshin promised Cross a "valuable consideration" if Cross would persuade the individual railroad presidents to use their influence to cause Chicago Terminal Lines to eliminate plaintiff from the transfer business in Chicago and grant the contract instead to a corporation to be formed by Keeshin. This was to be accomplished by Cross' representing to the railroad presidents that he would exercise his influence on the Interstate Commerce Commission in their favor. During the months that followed, various acts were performed by the defendants to accomplish this objective, and the plan was brought to fruition in October, 1955. At that time, in accordance with the terms of the conspiracy, the transfer
51 contract was granted by Chicago Terminal Lines to Railroad Transfer Service, Inc., which was organized by Keeshin for the purpose of accepting it. This was done without any opportunity to plaintiff to compete for the contract, and despite the fact that the terms of the new agreement were less favorable to the railroads than those under which the plaintiff had formerly operated and those

which it was prepared to offer. This is a broad outline of the complaint. Certain of its detailed allegations will be considered in the course of an examination of the objections raised by the defendants.

The first of those objections takes the form of a syllogism, and runs as follows: The fact that the contract with Keeshin for terminal transfer services was an exclusive one did not make it illegal as a monopoly; that such contract was made by the railroads acting together did not indicate the existence of a monopoly, since they were not competitors but were in the position of a single buyer, and as such free to deal with whom they pleased; therefore, no violation of the anti-trust laws has occurred. As in all such arguments, the conclusion must fail if either the major or minor premise is in error. In this case, the major premise may be passed without much ado, since it has been held that the granting of an exclusive contract for the performance of this type of service is not the creation of a monopoly (*United States* v. *Yellow Cab Co., supra*, at 229).

The flaws in the proposition lie in the minor premise:
52 the assumption that the railroads could lawfully act together to grant a transfer contract ignores completely the complaint's allegation that the purpose and effect of that joint action was and is to prevent competition in bidding for contracts for terminal service. Acts otherwise lawful are "within the proscription of the anti-trust statutes, *if done for the purposes prohibited by the anti-trust laws; i.e., to eliminate competition.*" (*Noerr Motor Freight* v. *Eastern R.R. President's Assn.*, 113 F. Supp. 737, 742 (E.D. Pa. 1953; see also *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416, 459 (C.A. 10, 1952) and *Cape Cod Food Products* v. *National Cranberry Assn.*, 119 F. Supp. 900, 907 (D. Mass. 1954). That the alleged purpose here is prohibited by the anti-trust laws is perfectly plain. Competition may be as effectively eliminated by preventing it from coming into existence as by killing it after it is

flourishing; and these alternate methods of execution are equally repugnant to the anti-trust laws (*Noerr Freight, supra; American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869, 873 (C.A. 4, 1950); *United States* v. *Griffith*, 334 U.S. 100 (1948); *American Tobacco Co.* v. *United States*, 338 U.S. 781, 809 (1946).

Certainly the defendant railroads may deal with whom they please, and are not compelled to enter into a contract with plaintiff if they do not wish to do so. What they
53 may not do, and what it is alleged that they have done, is to deliberately close, to the plaintiff and to everyone except Keeshin, competition in an important field of interstate commerce. As the Supreme Court remarked in *United States* v. *Yellow Cab Co., supra*,—

> "It is true, of course, that exclusive contracts for the transportation service in question are not illegal (citation). But a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case and it is a conspiracy of that type that runs afoul of the Sherman Act." (332 U.S., at page 229)

An examination of the complaint also reveals the weakness of the assumption that the several defendants were in the position of single buyers. It is alleged that the railroads planned and achieved the illegal exclusion from competition in concert with Keeshin (a prospective competitor of plaintiff), and Cross. The right to deal with whom one pleases does not include "agreeing or combining with another person in order to deprive a third person of a complete freedom of contract" (*United States* v. *Interstate Circuit, Inc.*, 20 F. Supp. 868, 872 (N.D. Tex., 1937). And quite aside from the parts allegedly played by Keeshin and Cross, it is clear that non-competitors subject themselves to the prohibitions of the Sherman Act when they conspire to restrain the trade of a third person (*United States* v. *General Motors*, 121 F. 2d 376 (C.A. 7,

1941); *United States* v. *New York Great A & P.*, 173
54 F. 2d 79, 88 (C.A. 7, 1949). The railroads, in short,
were not free to "create artificial conditions, which necessarily impede or burden" interstate commerce (*United States* v. *Patten*, 226 U.S. 525, 541 (1913), and this is the result of the conduct described in the complaint.

Defendants' next argument, to which they devote considerable space in their briefs, is stated by them as follows: "That the railroads were induced by alleged improper influence exerted upon them by a third party to choose Transfer rather than Parmelee did not convert the otherwise lawful conduct of the railroads into a Sherman Act violation." This conclusion is based on the assumption that their conduct was lawful except for the improper motives alleged; since it has just been held that it was not "otherwise lawful," but on the contrary illegal, the argument fails and must be disregarded. If the effect and purpose of a series of acts is to restrain or monopolize interstate commerce, the motive which inspires it, whether good or bad, is irrelevant (*Noerr Motor Freight, supra; Cape Cod Food Products, supra*).

It is urged that the complaint is fatally defective in that it fails to allege an injury to the public as opposed to a merely private wrong; and of course such an allegation is required (*Fedderson Motors, Inc.* v. *Ward*, 180 F. 2d 519
(C.A. 10, 1950). In the instant case, however, the re-
55 quirement has been met. The allegation of the elimination of competition for the contract to provide terminal transfer services is itself sufficient (*United States* v. *Yellow Cab Co., supra*). The importance of this service to the traveling public is too clear to require elucidation; and the allegation that its cost increased while service rendered declined manifestly sets forth a public rather than a merely private injury. (*National Used Car Market Reports* v. *Nat'l Automobile Dealers Ass'n*, 200 F. 2d 359 (App. D.C., 1952).

Defendants insist with considerable vigor that the complaint must fail because there is no allegation that the plaintiff "would have been awarded the contracts in question but for the wrongful conduct of defendants", and hence there is no adequate support for the claim for damages. Their argument is that, conspiracy or no, the railroads might have awarded the terminal contract to someone other than plaintiff, which they would have had a perfect right to do. This statement of the case, though true, is misleading. It is beyond the power of the plaintiff, or anyone else, to say now with certainty what might or might not have happened had the conspiracy not intervened. Facts have been alleged from which it would be possible and reasonable to draw the inference that the contract would have been awarded to plaintiff but for the wrongful conduct of the defendants. This is sufficient. (*Sun-*
56 *beam Corp.* v. *Payless Drug Stores*, 113 F. Supp. 31, 43 N.D. Cal., S.D., 1953); *Story Parchment Co.* v. *Peterson Co.*, 282 U.S. 555 (1931). The allegations concerning the long and harmonious previous relationship between the parties and of plaintiff's willingness to perform the service for a lower price in themselves go far toward establishing this thesis. For comparable situations, reference is made to *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416 (C.A. 10, 1952); *Story Parchment Co.* v. *Peterson Co., supra; Bigelow* v. *R.K.O. Pictures*, 326 U.S. 251 (1945).

The main brief was filed by the individual railroad presidents and five railroads; other defendants (quite properly and for the purpose of avoiding duplication) have adopted this brief as their own. The New York Central Railroad contends in addition that the complaint fails to state a cause of action as to it. This contention must be overruled; paragraphs 31, 32 and 33 of the complaint sufficiently allege the participation of all defendants, including the New York Central, in a past and present conspiracy

(*Louisiana Farmers' Protective Union, Inc.* v. *Great Atlantic & Pacific Tea Co.*, 131 F. 2d 419, C.A. 8, 1942); *United States* v. *Maryland State Licensed Beverage Ass'n Inc.*, 138 F. Supp. 685 (D. Md., 1956).

For the foregoing reasons, the various objections urged by the defendants are without merit. The complaint
57 on its face states a cause of action under the anti-trust laws. A successful conspiracy to restrain and monopolize interstate commerce by eliminating competition is clearly set forth; that the methods of accomplishing this objective are unusual is not important. The motion to dismiss will accordingly be overruled.

Philip L. Sullivan
Philip L. Sullivan, Judge.

Sept. 19th 1956.

58

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

ORDER

Upon due consideration the Court being fully advised and having this day filed its Memorandum Opinion it is Ordered that the motion to dismiss as to each defendant be and the same hereby is denied and each defendant is granted 30 days from this date to answer complaint.

59

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

ANSWER OF JOHN L. KEESHIN AND RAILROAD TRANSFER SERVICE, INC., A DELAWARE CORPORATION

ANSWER

(October 19, 1956)

John L. Keeshin and Railroad Transfer Service, Inc., by Albert J. Meserow, Theodore J. Isaacs and Jerome F.

Dixon, their attorneys, for answer to the complaint say:

First Defense

The Complaint does not state a claim entitling plaintiff to the relief sought or any other relief.

Second Defense

1-2. Paragraphs 1 and 2 of the complaint consist of
60 legal conclusions to which no answer is necessary or appropriate.

3-6. They admit the allegations of paragraph 3 to 6 both inclusive.

7. They deny the allegations of paragraph 7.

8-9. They admit the allegations of paragraph 8 and 9.

10. They admit the allegations of the first sentence of paragraph 10 but deny the allegations of the second sentence of that paragraph.

11. They admit the allegations of paragraph 11.

12. They deny the allegations of paragraph 12.

13. They deny the allegations of paragraph 13.

14. They admit the allegations of paragraph 14, except that they deny the allegation that the connecting railroads involved in interstate trips through Chicago in most instances do operate into the same terminal station.

15. They admit that each day some persons make the arrangements described in paragraph 15, but deny that large numbers of persons make these arrangements each day.

16. Paragraph 16 is comprised of conclusions of law which defendants are not required to answer.

17. They admit the allegations of paragraph 17. They aver however, that the other persons referred to in the last sentence of that paragraph were plaintiff and its
61 predecessors in interest until October 1, 1955, and they further aver that plaintiff and its predecessors in interest performed the transfer services described under ar-

rangements with the railroads under which only plaintiff and its predecessors in interest conducted transfer services for routine passenger movements.

18. They deny the allegations of paragraph 18 as averred. They aver that the railroads have always been free to contract with any person for the giving of transfer services, except as that right was and is limited by lawful contract commitments but that prior to the 1954 negotiations for a new arrangement, there was no person who made an offer to perform the transfer service other than plaintiff and its predecessors in interest.

19. They deny the allegations of paragraph 19.

20. They deny the allegations of paragraph 20, except that they admit that plaintiff and its predecessors were engaged by the railroads to operate station transfer services in Chicago, did operate those services, and also pick-up and delivery services, and used vehicles and employed personnel in connection with those services; and they admit that plaintiff stated itself to be willing and able to continue to operate the station transfer service and also pick-up and delivery service, and that it offered to do so. However,

62 they aver that the offer of this defendant John L. Keeshin was more favorable to the traveling public and the railroads than the offer of plaintiff. Without limiting the denial, they deny that there was or is a conspiracy and that plaintiff was prevented from continuing the aforesaid services by any conspiracy.

21-22. They deny the allegations of paragraphs 21 and 22.

23. They deny the allegations of paragraph 23, except that they are informed and believe and upon such information and belief aver that on or about March 1951 the railroads which were employing plaintiff to perform the station transfer service appointed the six defendant railroads as a committee to review the cost to the railroads of providing the transfer service, to solicit motor vehicle

operators in addition to plaintiff to submit proposals to render station transfer and pick-up and delivery services, and to negotiate with the various motor vehicle operators for a contract to perform station transfer and pick-up and delivery services on behalf of the railroads; and that said committee agreed to report its findings and recommendations to the other railroads from time to time.

24. They deny the allegations of paragraph 24, except that they are informed and believe and upon such information and belief aver that the defendant railroads, acting on behalf of all the railroads terminating in Chicago who have use for transfer services, in 1951 and thereafter,
63 solicited various motor vehicle operators with respect to the rendition of station transfer and pick-up and delivery services and negotiated with some of these operators with respect to the proposed performance of these services, but no new arrangements resulted from these negotiations; that on January 29, 1954 another committee, consisting of the six defendant railroads, was formed for the purpose and given the assignment of reviewing the interstation transfer situation with a view to reducing the cost of and improving the service, of determining what motor vehicle operators would be capable and desirous of performing interstation transfer service for the railroads, of soliciting from these operators proposals for a contract for the performance of the services required, and of considering and making recommendations with respect to the proposals received; and that thereafter this committee made the study and from time to time reported its findings and in June 1955 made a recommendation to all of the railroads requiring said services.

25. They admit the allegations of paragraph 25.

26. They admit the allegations of paragraph 26.

27. Paragraph 27 consists of plaintiff's conclusions of law which defendants are not required to answer.

28. They admit the allegations of paragraph 28.

29. Paragraph 29 consists of argumentative matter which defendants are not required to answer.

30. They deny the allegations of paragraph 30.

64 31-32. They deny the allegations of paragraphs 31 and 32.

33. They deny the allegations of paragraph 33 and each subparagraph thereof except as hereinafter stated. They admit that the proposal of defendant Keeshin was accepted by all the railroads requiring said services at a meeting of representatives on June 13, 1955, and that plaintiff was so notified. Without limiting the denial made above in this paragraph, they deny that any representative of any railroad recommended the elimination of plaintiff from the business of rendering station transfer and pick-up and delivery services, except as the elimination of plaintiff was an incidental result of the acceptance of this defendant Keeshin's proposal to render the services. They admit the allegations of subparagraph (E), and the allegations of the first sentence of subparagraph (I), and they further admit that defendant Hugh Cross resigned as a member of the Interstate Commerce Commission. They aver that the offer of the defendant Keeshin was more advantageous to the travelling public and the railroads than the offer of plaintiff and was accepted by the railroads solely for that reason.

34-36. They deny the allegations of paragraphs 34, 35 and 36, both inclusive.

Wherefore, defendants ask that the complaint be dismissed and that their costs be assessed against plaintiff.

65 COUNTERCLAIM.

John L. Keeshin and Railroad Transfer Service, Inc., a Delaware corporation, counterclaimants, counterclaim against Parmelee Transportation Company and Morris Markin and allege as follows:

COUNT I.

1. This counterclaim is filed against counterdefendants under § 4 and 16 of the Clayton Act, 15 U. S. C. § 15 and 26, to recover damages sustained by counterclaimants by reason of counterdefendants' violations of § 1 and 2 of the Sherman Act, 15 U. S. C. § 1 and 2, and for injunctive relief against said unlawful conduct by counterdefendants.

2. Twenty-one railroads operate passenger services terminating in Chicago. Each railroad has its passenger terminal at one of the eight railroad stations in downtown Chicago. Each of these stations is used by from one to six railroads. A large number of railroad passengers whose continuous journeys begin and terminate outside Chicago travel through Chicago and transfer from one incoming railroad to another outgoing railroad. Approximately 3,900 per day of these passengers transfer between railroads located in different terminal stations. More than 99% of these passengers are traveling on through tickets, purchased by payment of a single joint fare for the entire trip, between origin and destination points located in different states.

3. Counterdefendant, Parmelee Transportation Company (and its predecessors in interest, hereinafter collectively referred to as Parmelee) was, prior to October 1, 1955, engaged in the business of transferring railroad passengers traveling through Chicago on through tickets and their baggage among Chicago's eight railroad stations (interstation transfer service) and in carrying baggage between these stations and other places in the Chicago area (pick-up and delivery service). Over 99% of these passengers were so transferred in the course of interstate rail journeys, and most of the baggage was so transported as a part of a continuous interstate movement.

4. Parmelee performed its interstation transfer service for and pursuant to agreements with the railroads termi-

nating in Chicago. Interstate rail passengers traveling through Chicago received, as part of their through tickets, transfer coupons entitling them to interstation transfer service without additional charge, except in the limited number of cases in which a one-way fare from Chicago to destination would be less than a specified minimum sum. Thus, with the minor exception noted, the entire cost of the station transfer service was paid for and absorbed by the railroads.

5. Until October 1, 1955, and for many years prior thereto, Parmelee enjoyed a monopoly of the business
67 of performing an interstation transfer service in Chicago. Parmelee exploited its monopoly during this period by raising from time to time the price of the transfer service to the railroads, while refusing to permit the railroads to examine its books to determine whether these price increases were justified.

6. In 1954 the railroads, for the purpose of obtaining the best possible transfer service at the lowest cost, appointed a committee consisting of six railroads and delegated to this committee the authority and responsibility of making a study of the transfer situation, determining what motor vehicle operators other than Parmelee would be capable and desirous of performing interstation transfer service for the railroads, soliciting from these operators proposals for contracts for the performance of the service, and considering and making recommendations with respect to the proposals received.

7. In performance of the duties delegated to it, the committee ascertained what motor vehicle operators in addition to Parmelee were capable of performing and might wish to perform the transfer service. It solicited from these operators and Parmelee proposals for an interstation transfer contract with the railroads. These proposals were carefully considered by the committee.

8. Counterclaimant John L. Keeshin, one of the motor vehicle operators solicited by the committee, submitted to the committee a proposal which provided for the ren-
68 dition for a period of five years of interstation transfer service of a quality superior to and at a cost lower than the service which Parmelee had been and was then providing and was offering to continue to perform. The committee, after carefully considering and weighing the proposal of counterclaimant Keeshin and the proposal submitted by Parmelee, unanimously concluded that the Keeshin proposal was more advantageous to the railroads and the traveling public and unanimously voted to recommend to the railroads the acceptance of that proposal.

9. On or about June 13, 1955 the railroads decided to accept counterclaimant Keeshin's proposal and on that date notified counterclaimant Keeshin that they would enter into a contract with him embodying the terms of that proposal. On the same date the railroads advised Parmelee that after the close of business on September 30, 1955 they would no longer require the services of Parmelee in the transfer of passengers and baggage among railroad stations in Chicago.

10. Thereafter, the railroads and counterclaimant Railroad Transfer Service, Inc. (hereinafter called "Railroad Transfer"), a corporation organized by counterclaimant Keeshin, executed a contract providing for the performance by Railroad Transfer of the interstation transfer service and certain pick-up and delivery service for a period of five years.

11. Subsequent to June 13, 1955, Parmelee and counterdefendant Morris Markin, Parmelee's President and Chairman of the Board of Directors, unlawfully combined and
69 conspired with others to counterclaimants unknown to eliminate counterclaimants Keeshin and Railroad Transfer as competitors for the interstation transfer service contract, to render said Keeshin and Railroad Transfer un-

able to perform the interstation transfer service, and thereby unlawfully to restrain and monopolize the aforesaid interstate trade and commerce in violations of § 1 and 2 of the Sherman Act. The means the conspirators agreed to employ to achieve this end were as follows: Parmelee, Markin and other conspirators would induce the City Council of the City of Chicago to amend its ordinance for the regulation of public passenger vehicles, Chapter 28 of the Municipal Code of Chicago, to make it impossible for anyone except Parmelee to obtain a license from the City to operate terminal vehicles for the conduct of interstation transfer service. They would induce the officials of the City of Chicago administering the ordinance to refuse to issue a license to counterclaimants Keeshin or Railroad Transfer for the operation of terminal vehicles in connection with an interstation transfer business. They would induce the enforcement officers of the City of Chicago to refuse to permit counterclaimants Keeshin or Railroad Transfer to operate terminal vehicles in connection with the interstation transfer service.

12. On and prior to June 13, 1955, Chapter 28 of the Municipal Code of Chicago contained the following provisions:

Section 28-1: " 'Public passenger vehicle' means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois.

" 'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations."

Section 28-6: "Upon receipt of an application for a public passenger vehicle license the commissioner

shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year. (Passed Coun. J. 12-20-51, p. 1596; amend. 4-16-52, p. 2178)."

Section 28.31: "No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan. (Passed Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905)."

71 13. On and prior to June 13, 1955, Parmelee was the only motor vehicle operator having a transfer contract with the railroads and licensed under the ordinance.

14. After June 13, 1955 Parmelee, Markin and their co-conspirators, pursuant to the aforesaid unlawful com-

bination and conspiracy, for the purpose of eliminating counter-claimants Keeshin and Railroad Transfer as competitors of Parmelee for the interstation transfer business and restraining the aforesaid trade and commerce in said business, in violation of § 1 and 2 of the Sherman Act, induced the City Council of the City of Chicago, on or about July 26, 1955, to pass the following ordinance:

"*Be It Ordained by the City Council of the City of Chicago*:

"Section 1. Section 28-1 of the Municipal Code of Chicago is amended by striking the definition of 'Terminal vehicle' contained therein and substituting therefor the following:

" 'Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31.

"Section 2. Section 28-31 of said code is amended to read as follows:

"28-31 Terminal Vehicles) Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan.

72 "Section 3. Chapter 28 of said code is amended by adding two new sections after Section 28-31 as follows:

"28-31.1 Public Convenience and Necessity) No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner

as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

"1. The public demand for such service;

"2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;

"3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

"4. Any other facts which the commissioner may deem relevant.

"If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

"28-31.2 Local Fares) The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried
73 at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner.

"Section 4. This ordinance shall be effective upon its passage and due publication."

15. The purpose of Parmelee in inducing the enactment, and the City Council in enacting, the aforesaid amendment, and the effect of the amendment, was to preclude the issuance of a motor vehicle license by the City of Chicago for the operation of terminal vehicles in connection with an interstation transfer business to counterclaimants Keeshin, Railroad Transfer or any other competitor or potential competitor of Parmelee and to insure the perpetuation of Parmelee's monopoly of the aforesaid interstate commerce.

16. The City of Chicago and its officials asserted and assert that the ordinance is valid and enforceable against counterclaimant Railroad Transfer and that the City will enforce it against counterclaimant Railroad Transfer.

17. Counterclaimant Railroad Transfer was compelled, as the alternative to permitting Parmelee to exclude the competition of Railroad Transfer and unlawfully to monopolize the aforesaid interstate commerce, to attempt to establish in a judicial proceeding that the aforesaid ordinance did not apply to the operations of Railroad Transfer under its contract with the railroads, or that if the ordinance did apply to that operation it was void under the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3. It asserted these contentions
74 in a declaratory judgment action in the United States

District Court for the Northern District of Illinois, Eastern Division, entitled, Atchison, Topeka and Santa Fe Railway Company, et al. *vs.* City of Chicago, et al., No. 55 C 1883.

18. In pursuance of the aforesaid unlawful course of conduct, and in an effort to insure that its unlawful attempt to monopolize the aforesaid commerce and to eliminate the competition of counterclaimant Railroad Transfer

would succeed, Parmelee intervened in the aforesaid action, contending that said counterclaimant's operations "have substantially and unfairly affected" Parmelee's business and arguing to the Court that the ordinance was valid, that it applied to said counterclaimant and that it rendered unlawful the conduct by said counterclaimant of the interstation transfer business.

19. On motion of the defendant City of Chicago in that action, the District Court entered summary judgment in favor of the defendants and against the plaintiffs, with costs and dismissed the action.

20. The plaintiffs in that action have appealed to the United States Court of Appeals for the Seventh Circuit, where the case is now pending as cause No. 11692. The District Court enjoined enforcement of the ordinance during the pendency of the appeal, upon the filing of a bond in the amount of $50,000.

75 21. In an effort to prevent the injury to itself which would result from the enforcement of the ordinance pursuant to counterdefendants' unlawful purpose, counterclaimant Railroad Transfer has expended, in the aforesaid action, the sum of $50,000 in attorney fees, costs and other expenses.

22. If counterdefendants succeed in their aforesaid unlawful object by causing the ordinance to be enforced against Railroad Transfer, counterclaimants will be deprived of the right to contract with the railroads who will be denied the benefits of competition for the transfer service. Parmelee, as the possessor of an unlawful monopoly, will be free to dictate to the railroads, as it has in the past, the terms upon which transfer service will be rendered, to the detriment of counterclaimants, the railroads and the public. Counterclaimants' damage resulting from the elimination of competition for the transfer service pursuant to the aforesaid unlawful conduct will exceed $5,000,000.

23. The aforesaid unlawful attempted monopolization is continuing and unless equitable relief is granted, will continue to cause irreparable injury to counterclaimants and to the public. There is no adequate remedy at law.

COUNT II

1-12. Counterclaimants reallege paragraphs 1-10, 12 and 13 of Count I of this counterclaim as paragraphs 1-12, 76 respectively of this count.

13. Parmelee, under the direction of counterdefendant Morris Markin, its president, attempted to eliminate counterclaimant Railroad Transfer as a competitor and thereby attempted to monopolize the aforesaid interstate commerce, consisting of the interstation transfer business, in violation of Section 2 of the Sherman Act, by inducing the City Council of the City of Chicago, on or about July 26, 1955, to pass the ordinance set forth in paragraph 14 of Count I of this counterclaim.

14-22. Counterclaimants reallege paragraphs 15-23 of Count I of this counterclaim as paragraph 14-22, respectively, of this paragraph.

WHEREFORE, counterclaimants ask:

(a) That damages be assessed in their favor against counterdefendants in treble damages in the amount of $5,700,000.

(b) That counterdefendants be perpetually enjoined from continuing the aforesaid combination and conspiracy and attempt to monopolize;

(c) That the aforesaid combination and conspiracy and attempt to monopolize be declared unlawful;

(d) That counterclaimants be allowed a reasonable attorney's fee and costs; and

77 (e) That counterclaimants be granted such further relief as the Court may find appropriate.

Albert J. Meserow
Albert J. Meserow

Jerome F. Dixon
Jerome F. Dixon
Theodore J. Isaacs
Theodore J. Isaacs
Attorneys for defendants aforesaid and for counterclaimants.

78

In The United States District Court

* * (Caption—No. 56 C 323) * *

ANSWER OF DEFENDANT RAILROAD PRESIDENTS AND CERTAIN OF DEFENDANT RAILROADS.

(Filed Oct. 19, 1956)

79 Howard E. Simpson, Paul E. Feucht, Wayne A. Johnston and Fred G. Gurley, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago and North Western Railway Company, Illinois Central Railroad Company and The Pennsylvania Railroad Company, defendants, by Floyd E. Thompson, Albert E. Jenner, Jr. and Philip W. Tone, their attorneys, for answer to the complaint herein say:

80 First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

1-2. Paragraphs 1 and 2 of the complaint consist of legal conclusions to which no answer is necessary or appropriate.

3-6. They admit the allegations of paragraph 3 through 6.

7. They deny that Paul E. Feucht resides in Barrington, Illinois, or is the president or a director of the Chicago and North Western Railway Company, but they admit he was the president and a director of that railroad at the time the complaint was filed.

8-9. They admit the allegations of paragraphs 8 and 9.

10. They admit the allegations of the first sentence of paragraph 10. They deny the allegations of the second sentence of that paragraph.

11. They admit the allegations of paragraph 11.

12. They deny the allegations, and each of them, of paragraph 12.

13. They deny that the conspiracy alleged in the complaint existed or exists, and therefore they deny the allegations, and each of them, of paragraph 13.

14. They admit the allegations of paragraph 14, except that they deny the allegation that the connecting railroads involved in interstate trips through Chicago "in most instances" do not operate into the same terminal station.

81 15. They admit that each day some persons make the arrangements described in paragraph 15, but deny that large numbers of persons make these arrangements each day.

16. Paragraph 16 consists of legal conclusions to which no answer is necessary or appropriate.

17. They admit the allegations of paragraph 17. They aver that the "other persons" referred to in the last sentence of that paragraph were plaintiff and its predecessors in interest until October 1, 1955, and that plaintiff and its predecessors in interest performed the transfer services described under arrangements with the railroads pursuant to which only plaintiff and its predecessors in interest conducted transfer services for routine passenger movements.

18. They deny the allegations of paragraph 18 as they are stated. They aver that the railroads were and are free to contract with any person for the rendition of transfer services, except as that right was and is limited by lawful contract commitments, but that prior to the 1954 negotiations for a new arrangement, there was no person who made an offer to perform the transfer service other than plaintiff and its predecessors in interest.

19. Paragraph 19 consists entirely of speculation, conclusion and argument not requiring an answer, but they, nevertheless, deny the allegations as they are stated.

20. They deny the allegations, and each of them, of paragraph 20, except that they admit that plaintiff and its predecessors were engaged by the railroads to operate station transfer services in Chicago, did operate those services and also pick-up and delivery services, and used vehicles and employed personnel in connection with
82 those services; and they admit that plaintiff stated itself to be willing and able to continue to operate the station transfer service and also pick-up and delivery service, and that it offered to do so. However, they aver that the offer of John L. Keeshin was more favorable to the traveling public and the railroads than the offer of plaintiff. Without limiting the denial, they deny specifically that there was or is a conspiracy and that plaintiff was prevented from continuing the aforesaid services by any conspiracy.

21-22. They deny the allegations, and each of them, of paragraphs 21 and 22.

23. They deny the allegations, and each of them, of paragraph 23, except that they admit that on or about February 9, 1951 the railroads which were employing plaintiff to perform the station transfer service appointed the six defendant railroads as a committee to review the cost to the railroads of providing the transfer service, to solicit motor vehicle operators in addition to plaintiff to submit

proposals to render station transfer and pick-up and delivery services, and to negotiate with the various motor vehicle operators for a contract to perform station transfer and pick-up and delivery services on behalf of the railroads.

24. They deny the allegations, and each of them, of paragraph 24, except that they admit that the defendant railroads, acting on behalf of all the railroads terminating in Chicago who have use for transfer services, in 1951 and thereafter, solicited various motor vehicle operators with respect to the rendition of station transfer and pick-up and delivery services and negotiated with some of these operators with respect to the proposed performance of these services, but no new arrangements resulted from
83 these negotiations. They aver that on January 29, 1954 another committee, consisting of the six defendant railroads, was formed for the purpose and given the assignment of reviewing the interstation transfer situation with a view to reducing the cost of and improving the service, of determining what motor vehicle operators would be capable and desirous of performing interstation transfer service for the railroads, of soliciting from these operators proposals for a contract for the performance of the services required, and of considering and making recommendations with respect to the proposals received. Thereafter this committee made the study and from time to time reported its findings and in June 1955 made a recommendation to all of the railroads requiring said services.

25. They admit the allegations of paragraph 25.

26. They admit the allegations of paragraph 26.

27. Paragraph 27 consists of legal conclusions and argument to which no answer is necessary or appropriate.

28. They admit the allegations of paragraph 28.

29. Paragraph 29 consists of argument, insinuations and innuendo to which an answer is neither necessary nor appropriate.

30. Paragraph 30 consists of scandalous and impertinent assumptions and conclusions which require no answer, but they, nevertheless, deny all of the insinuation and innuendo presumptuously woven into generalizations and pious mouthings on ethical business conduct, and they deny that they or any of them breached any duty.

31-32. They deny the allegations, and each of them, of paragraphs 31 and 32.

84 33. They deny the allegations, and each of them, of paragraph 33, except as hereinafter stated:

(c) They aver, as to subparagraph (c) of paragraph 33, that for several months prior to and through June 3, 1955, the six defendant railroads, acting through their passenger agents, considered and weighed the proposals received by them solely on their merits and on or about June 3, 1955, unanimously voted to and did recommend to the railroads the acceptance of the proposal of Keeshin solely because they in good faith believed this proposal was more advantageous to the traveling public and to the railroads.

(d) They admit that the Keeshin proposal was accepted by all the railroads requiring said services at a meeting of representatives on June 13, 1955, and that plaintiff was so notified. Without limiting the denial made above in this paragraph, they specifically deny that any representative of any railroad recommended the elimination of plaintiff from the business of rendering station transfer and pick-up and delivery services, except as the elimination of plaintiff was an incidental result of the acceptance of Keeshin's proposal to render the services.

(e) They admit the allegation of subparagraph (e).

(f) They admit that on or about September 15, 1955, Earl B. Padrick, acting as agent of all railroads requiring transfer and delivery service pursuant to

separate written instructions received from each railroad, executed a written contract dated as of October 1, 1955, with Railroad Transfer Service, Inc. Without limiting the denial made at the beginning of this paragraph, they deny specifically the characterization
85 of this contract in subparagraph (f) and they aver that the contract speaks for itself and refer to the contract for the meaning and effect thereof, and they aver that said contract provided terms and conditions more favorable to the traveling public and the railroads than plaintiff had offered.

(h) They admit that on or about September 29, 1955, Railroad Transfer Service, Inc. qualified to do business in Illinois. They state that the allegations of subparagraph (h), concerning the supposed requirement of a public passenger vehicle license and the supposed violation of the purported Chicago Public Passenger Vehicle Ordinance, are irrelevant and immaterial.

(i) They admit the allegations of the first sentence of subparagraph (i). They aver that the services performed by Transfer pursuant to the contract have been and are less costly to the railroads and are more extensive and valuable to the traveling public and to the railroads than the services previously performed by plaintiff and which plaintiff had offered to continue to perform.

(j)-(l) Without limiting the general denial at the beginning of this paragraph 33, they specifically deny the impertinent and scandalous allegations of subparagraphs (j), (k) and (l).

(m) They admit that on November 23, 1955, defendant Cross resigned his position with the Interstate Commerce Commission, and without limiting the denial, they specifically deny that such resignation was for the purpose of concealing the non-existing alleged conspiracy.

86 34-36. They deny the allegations, and each of them, of paragraphs 34, 35 and 36.

Wherefore, defendants ask that the complaint be dismissed and that their costs be assessed against the plaintiff.

FLOYD E. THOMPSON
ALBERT E. JENNER, JR.
PHILIP W. TONE
By /s/ Philip W. Tone
Attorneys for said Defendants.

Of Counsel:
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Illinois Central Railroad Company
FLOYD J. STUPPI,

Attorney for Fred G. Gurley and The Atchison,
Topeka and Sante Fe Railway Company.
ROBERT H. BIERMA,
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Attorneys for The Pennsylvania Railroad Company.

87

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 56 C 323)

ANSWER OF DEFENDANT THE NEW YORK CENTRAL RAILROAD COMPANY

(Filed Oct. 19, 1956)

The New York Central Railroad Company, by its attorneys, for answer to the complaint herein says:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. Paragraphs 1 and 2 of the complaint consist of legal conclusions to which no answer is necessary or appropriate.

2. It denies that Paul E. Feucht resides in Barrington, Illinois, or is the president or a director of the Chicago and North Western Railway Company as alleged in paragraph 7.

3. The allegations of the second sentence of paragraph 10 are denied.

4. It denies the allegations, and each of them, of paragraph 12.

88 5. It denies that the conspiracy alleged in the complaint existed or exists, and therefore it denies the allegations, and each of them, of paragraph 13.

6. It admits the allegations of paragraph 14, except that it denies the allegation that the connecting railroads involved in interstate trips through Chicago "in most instances" do not operate into the same terminal station.

7. It admits that each day some persons make the arrangements described in paragraph 15, but denies that large numbers of persons make these arrangements each day.

8. Paragraph 16 consists of legal conclusions to which no answer is necessary or appropriate.

9. It admits the allegations of paragraph 17. It avers that the "other persons" referred to in the last sentence of that paragraph were plaintiff and its predecessors in interest until October 1, 1955, and that plaintiff and its predecessors in interest performed the transfer services described under arrangements with the railroads pursuant to which only plaintiff and its predecessors in interest conducted transfer services for routine passenger movements.

10. It denies the allegations of paragraph 18 as they are stated. It avers that the railroads were and are free to contract with any person for the rendition of transfer services, except as that right was and is limited by lawful contract commitments, but that prior to the 1954 negotiations for a new arrangement, there was no person who
89 made an offer to perform the transfer service other than plaintiff and its predecessors in interest.

11. Paragraph 19 consists entirely of speculation, conclusion and argument not requiring an answer, but it nevertheless, denies the allegations as they are stated.

12. It denies the allegations, and each of them, of paragraph 20, except that it admits that plaintiff and its predecessors were engaged by the railroads to operate station transfer services in Chicago, did operate those services, and also pick-up and delivery services, and used vehicles and employed personnel in connection with those services; and it admits that plaintiff stated itself to be willing and able to continue to operate the station transfer service and also pick-up and delivery service, and that it offered to do so. However, it avers that the offer of John L. Keeshin was more favorable to the traveling public and the railroads than the offer of plaintiff. Without limiting the denial, it denies specifically that there was or is a conspiracy and that plaintiff was prevented from continuing the aforesaid services by any conspiracy.

13. It denies the allegations, and each of them, of paragraphs 21 and 22.

14. It denies the allegations, and each of them, of paragraph 23, except that it admits that on or about March 1951 the railroads which were employing plaintiff to perform the station transfer service appointed the six defendant railroads as a committee to review the cost to the railroads of providing the transfer service, to solicit motor vehicle operators in addition to plaintiff to submit proposals to render station transfer and pick-up and delivery services on behalf of the railroads; and that said committee agreed to report its findings and recommendations to the other railroads from time to time.

15. It denies the allegations, and each of them, of paragraph 24, except that it admits that the defendant railroads, acting on behalf of all the railroads terminating in Chicago who have use for transfer services, in 1951 and thereafter, solicited various motor vehicle operators with respect to the rendition of station transfer and pick-up and delivery services and negotiated with some of these operators with respect to the proposed performance of these services, but no new arrangements resulted from these negotiations. It avers that on January 29, 1954 another committee, consisting of the six defendant railroads, was formed for the purpose and given the assignment of reviewing the interstation transfer situation with a view to reducing the cost of and improving the service, of determining what motor vehicle operators would be capable and desirous of performing interstation transfer service for the railroads, of soliciting from these operators proposals for a contract for the performance of the services required, and of considering and making recommendations with respect to the proposals received. Thereafter this committee made the study and from time to time reported its findings and in June 1955 made a recommendation to all of the railroads requiring said services.

16. Paragraph 27 consists of legal conclusions and argument to which no answer is necessary or appropriate.

17. Paragraph 29 consists of argument, insinuations and innuendo to which an answer is neither necessary nor appropriate.

18. Paragraph 30 consists of impertinent assumptions and conclusions which require no answer, but it, nevertheless, denies all of the allegations of paragraph 30.

19. It denies the allegations, and each of them, of paragraphs 31 and 32.

20. It denies the allegations, and each of them, of paragraph 33, except as to the following sub-paragraphs:

(c) It avers, as to subparagraph (c) of paragraph 33, that for several months prior to and through June 3, 1955, the six defendant railroads, acting through their passenger agents, considered and weighed the proposals received by them solely on their merits and on or about June 3, 1955, unanimously voted to and did recommend to the railroads the acceptance of the proposal of Keeshin solely because they in good faith believed this proposal was more advantageous to the traveling public and to the railroads.

(d) It admits that the Keeshin proposal was accepted by all the railroads requiring said services at a meeting of representatives on June 13, 1955, and that plaintiff was so notified. Without limiting the denial
92 made above in this paragraph, it specifically denies that any representative of any railroad recommended the elimination of plaintiff from the business of rendering station transfer and pick-up and delivery services, except as the elimination of plaintiff was an incidental result of the acceptance of Keeshin's proposal to render the services.

(e) It admits the allegations of subparagraph (e).

(f) It admits that on or about September 15, 1955, Earl B. Patrick, acting as agent of all railroads requiring transfer and delivery service pursuant to separate written instructions received from each railroad,

executed a written contract dated as of October 1, 1955, with Railroad Transfer Service, Inc. Without limiting the denial made at the beginning of this paragraph, it denies specifically the characterization of this contract in subparagraph (f) and it avers that the contract speaks for itself and refers to the contract for the meaning and effect thereof, and it avers that said contract provided terms and conditions more favorable to the traveling public and the railroads than plaintiff had offered.

(h) It admits that on or about September 29, 1955, Railroad Transfer Service, Inc. qualified to do business in Illinois. It states that the allegations of
93 subparagraph (h), concerning the supposed requirement of a public passenger vehicle license and the supposed violation of the purported Chicago Public Passenger Vehicle Ordinance, are irrelevant and immaterial, and it avers that the assertion by plaintiff of the alleged ordinance in itself constitutes a violation of Section 2 of the Sherman Act.

(i) It admits the allegations of the first sentence of subparagraph (i). It avers that the services performed by Transfer pursuant to the contract have been and are less costly to the railroads and are more extensive and valuable to the traveling public and to the railroads than the services previously performed by plaintiff and which plaintiff had offered to continue to perform.

(m) It admits that on November 23, 1955, defendant Cross resigned his position with the Interstate Commerce Commission, and without limiting the denial, it specifically denies that such resignation was for the purpose of concealing the non-existing alleged conspiracy.

21. It denies the allegations, and each of them, of paragraphs 34, 35 and 36.

WHEREFORE, this defendant asks that the complaint be dismissed and that its costs be assessed against the plaintiff.

/s/ Marvin A. Jersild
/s/ R. J. Murphy
/s/ R. O. Olson
/s/ Wayne M. Hoffman
Attorneys for said defendant,
The New York Central Railroad Company

94 May 31, 1957: Filed Interrogatories propounded to Plaintiff by certain defendants.

103 July 1, 1957: Filed Interrogatories propounded to:

103 Defendant The Baltimore and Ohio Railroad Company.

107 Defendant The Atchison, Topeka and Santa Fe Railway Co.

111 Defendant Illinois Central Railroad.

115 Defendant The New York Central Railroad Company.

119 Defendant Chicago and North Western Railway Company.

123 Defendant The Pennsylvania Railroad Company.

127 Filed Objections of Plaintiff to interrogatories, propounded by certain defendants on May 31, 1957.

130 Filed Memorandum in support of plaintiff's objections.

135 July 9, 1957: Filed Memorandum in opposition to plaintiff's objections to interrogatories.

145 July 16, 1957: Filed Plaintiff's reply memorandum in support of objections to interrogatories propounded by certain defendants.

August 7, 1957: Filed objections of certain defendants to interrogatories propounded by plaintiff on July 1, 1957, *viz*:

156 By—Illinois Central Railroad Company.
160 The Pennsylvania Railroad Company.
164 The Baltimore and Ohio Railroad Company.
168 The Atchison, Topeka and Santa Fe Railway Company.
172 New York Central Railroad Company.
176 Chicago and North Western Railway Company.
180 Filed Brief in support of Railroad Defendants' objections to interrogatories.
211 August 26, 1957: Filed Answer to interrogatories propounded to plaintiff on May 31, 1957, by certain defendants.
289 September 6, 1957: Filed Motion of Defendant Railroads and Railroad Presidents compel answer to certain interrogatories.
293 Filed Brief in support of motion of defendant Railroads et al., to compel answer to certain interrogatories.
300 Filed Plaintiff's brief in opposition to the Railroad defendants' objections to plaintiff's interrogatories.
414 September 24, 1957: Filed Answer of plaintiff to motion of certain defendants to compel answers to interrogatories.
429 Filed Supplemental answer to interrogatories 7 (B) propounded to plaintiff on May 31, 1957 by certain defendants.
432 October 4, 1957: Filed Reply of Railroad defendants to plaintiff's brief in opposition to interrogatories.
464 October 10, 1957: Filed Reply Brief in support of motion of defendant Railroads and Railroad Presidents to compel answer to certain interrogatories.
476 October 14, 1957: Order entered denying motion of defendant railroads to set down for hearing their objections to the interrogatories.
477 November 13, 1957: Filed Memorandum of the Court.

484 November 15, 1957: Filed Memorandum in support of motion of defendant Railroads and Railroad Presidents to reconsider ruling sustaining plaintiff's objections to interrogatories propounded by certain defendants on May 31, 1957.

VOLUME II

490 January 6, 1958: Filed Notice and attached thereto:

492 Second set of interrogatories propounded to plaintiff by Defendant Railroads and Railroad Presidents.

501 January 16, 1958: Filed Objections of plaintiff to interrogatories propounded by defendant Railroads and Railroad Presidents on January 7, 1958.

504 January 20, 1958: Filed Motion of Parmelee Transportation Company to extend time to answer interrogatories.

507 January 22, 1958: Filed Plaintiff's brief in support of objections to interrogatories propounded by Defendant Railroads and Railroad Presidents on January 7, 1958.

515 February 6, 1958: Filed Answer to second set of interrogatories propounded to plaintiff on January 7, 1958 by certain defendants.

519 Filed Second supplemental answer to interrogatories propounded to plaintiff on May 31, 1957 by certain defendants.

524 February 7, 1958: Filed Brief in opposition to plaintiff's objections to second set of interrogatories propounded by defendant Railroads and Railroad Presidents on January 7, 1958.

540 February 18, 1958: Filed plaintiff's reply brief in support of objections to interrogatories propounded by defendant Railroads on January 7, 1958.

556 March 4, 1958: Filed defendants' supplementary brief on objections to second set of interrogatories.

560 June 10, 1958: Order entered sustaining objections

of plaintiff to second set of interrogatories propounded to plaintiff on January 7, 1958, in part and overruled in part.

564 June 30, 1958: Filed plaintiff's answer to second set of Interrogatories propounded by defendant Railroads and Railroad Presidents on January 7, 1958.

578 July 31, 1958: Filed Notice and Motion.

581

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

ORDER

This cause having come on to be heard on the motion of Plaintiff to set an early trial date, and the Court having heard counsel,

It Is Ordered That:

1. The motion of plaintiff to set a trial date is denied.

2. This cause is set for pre-trial conference November 17, 1958 at 10:00 A.M.

3. On or before September 25, 1958 plaintiff shall serve upon defendants and file with the Court a list of the documents it intends to offer in evidence at the trial;

4. On or before October 10, 1958 defendants shall serve upon plaintiff and file with the Court a list or lists of the documents they respectively intend to offer at the trial.

5. On or before October 20, 1958 plaintiff shall serve upon defendants and file with the Court an additional
582 list of the documents, if any, it intends to offer as rebuttal to documents appearing on defendants' list or lists.

6. On or before November 3, 1958 all parties shall serve upon all other parties and file with the Court their objections to the admission in evidence of documents appearing on lists submitted by opposing parties; and if any question as to the authenticity of a document is to be raised, a statement to that effect.

7. All parties are directed to be prepared to present and argue at the pre-trial conference all questions of evidence and scope of proof which they believe will or may arise during the trial of the case and any other matters which they believe will expedite the trial of this case.

Enter:

Judge

August 1, 1958.

583

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

PLAINTIFF'S LIST OF DOCUMENTS

(Filed September 25, 1958)

Plaintiff submits to and serves upon the defendants herein the following list of documents which plaintiff presently intends to offer in evidence at the trial of this cause.[1] Further preparation for trial, the procurement of admissions from defendants before trial or during the course of the trial may make it unnecessary to offer in evidence many of the herein listed documents. Plaintiff expressly reserves the right to offer in evidence at the trial of this cause, additional documents which are not now available to plaintiff but which may hereafter become available through discovery and pretrial procedures or independent investigation, and reserves the right to present at the trial of this cause schedules, graphs, charts and summaries prepared from information contained
584 in such documents or based upon further investigation:

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[1] In some instances the documents listed below are photostats or other copies, but pursuant to the discovery procedures followed heretofore, no effort is made herein to differentiate between originals and copies.

√ = Specifically mentioned in Motion.
× = *Objected to, but not specifically mentioned in* Motion.

√ 1. Documents identified at the deposition of W. C. Miller, Jr., taken in Washington, D. C. on February 5, 1957, and marked for identification as Miller Exhibits 1 through 9, inclusive, including the reverse sides of the exhibits and related exhibits which were identified by letters added to the numbers of the exhibit.

× 2. Telegram from Wayne A. Johnston to Hugh W. Cross dated May 26, 1955.

× 3. Documents identified at the deposition of N. Page Worthington taken in Baltimore, Maryland, on February 7, 1957, and marked for identification as C & P Exhibits 1 through 91, inclusive, including the reverse sides of the exhibits and related exhibits which were identified by letters added to the number of the exhibit.

× 4. Documents identified at the deposition of Howard E. Simpson taken in Baltimore, Maryland, on February 11, 1957, and marked for identification as Simpson Exhibits 1 through 8, inclusive. Included in this designation is Simpson Exhibit 5 which consists of the complete 1955 diary maintained by or for Mr. Simpson and Simpson Exhibit 6 which consists of the complete 1955 diary maintained by Mr. Schnell, Secretary to Mr. Simpson.

× 5. Documents identified at the deposition of J. F. Whittington taken in Baltimore, Maryland, on February 11, 1957, and marked for identification as Whittington Exhibits 7 and 8. Included in this designation is Whittington Exhibit 7 which consists of the complete 1955 diary maintained by or for Mr. Whittington.

6. Registration card for Mr. and Mrs. J. F. Whittington at The Madison Hotel in Atlantic City, New Jersey, No. 205916 indicating arrival April 8, 1955.

385

7. Ledger sheet of The Madison Hotel in Atlantic City, New Jersey, No. 205916 covering charges to Mr. and Mrs. J. F. Whittington for their stay at the hotel from April 8 to 11, 1955.
8. Letter from Floyd E. Thompson to Lee A. Freeman dated March 21, 1957.
9. Letter from Floyd E. Thompson to Lee A. Freeman dated April 8, 1957.
10. Documents identified at the deposition of Fred Carpi taken in Philadelphia, Pennsylvania, on February 12, 1957, and marked for identification as Capri Exhibits 2 through 4 and 5A through 5M, inclusive.
11. Letter dated March 20, 1957, from E. H. Barlow, Secretary, Eastern Railroad Presidents Conference to Lee A. Freeman, together with attachments showing the composition of the Executive Committee of the Eastern Railroad Presidents Conference during April 1 to December 1, 1955, and the members present at meetings of the E. R. P. C. during that period.
12. Documents identified at the deposition of Morris Forgash taken in New York City, New York, on March 15, 1957, and marked for identification as Forgash Exhibits 1 through 36, inclusive. In addition, copies of the following statements rendered by the New York Telephone Company covering charges for toll calls and telegrams to telephone number Oregon 5-5600 in New York City listed in the name of United

States Freight Company which statements were made available at the Forgash deposition but not specifically identified:

Summary sheet for May 17 in the statement for the month of May 1955, containing the initial entry "May 17 OLD GWICH .35"

Summary sheet for July 21 and 22 in the statement for the month of July 1955, containing the initial entry "July 21 SYRACUSE 4.20"

Summary sheet for August 5 and 6 in the statement for month of August 1955 containing the initial entry 'Aug 5 RUTHERFD .15"

586 Summary sheet for November 10 to 23 in the statement for the month of November 1955, containing the initial entry "Nov 10 FROM LITTLE ROCK 15.00".

× 13. Documents identified at the deposition of Elmer Van Buskirk taken in New York City, New York, on April 23, 1957, and marked for identification as Taft Hotel Exhibits 1A through 6, inclusive, including the reverse sides of the exhibits and related exhibits which were identified by letters added to the number of the exhibit.

× 14. Documents identified at the deposition of Allen Ennis taken in Washington, D. C. on May 15, 1957, and marked for identification as Ennis Exhibits 1 through 10B, inclusive, including the reverse sides of the exhibits and related exhibits which were identified by letters added to the number of the exhibit.

× 15. Documents identified at the deposition of Joseph Youdell taken in Washington, D. C. on May 15,

1957, and marked for identification as Youdell Exhibits 1 through 17A, inclusive, including the reverse sides of the exhibits and related exhibits which were identified by letters added to the number of the exhibits and including Exhibits 5B-1, 5B-2, 8B-1, 8B-2, 12B-1, 12B-2, 12B-3, 15B-1 and 15B-2.

16. Documents identified at the deposition of Joseph Neil Ryan taken in Washington, D. C. on May 15, 1957, and marked for identification as Ryan Exhibits 1 through 4, 5-1, 5-2, 6 through 9, 10A and 10B.

17. Travel vouchers submitted to Interstate Commerce Commission by Commissioner Hugh W. Cross covering a trip to New York City, New York, from March 17 to March 18, 1955, and a trip to Miami, Florida, from March 26 to March 30, 1955.

18. The appointment book for the year 1955 maintained by or for Mr. A. E. Perlman, President of the New York Central Railroad Co.

19. Printed transcript of hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 84th Congress, 2nd Session for November 15, 1955, involving "Hugh W. Cross—Chairman of the Interstate Commerce Commission" printed by the United States Government Printing Office.

587

20. Pages 1 through 5 and 28 through 34, inclusive, of Senate Report No. 1444 to 84th Congress, 2nd Session being "Annual Report of the Committee on Government Operations made by its Permanent Subcommittee on Investigations"

dated January 25, 1956, and printed by the United States Government Printing Office.

21. Documents identified at the deposition of E. H. Taylor-Hay taken in Chicago, Illinois, on October 29, 1956, and marked for identification as Parmelee Exhibits 1 through 8, inclusive.

22. Documents and photigraph identified at the deposition of Hugh W. Cross taken in Chicago, Illinois, on November 28 and 29, 1956, and marked for identification as Cross Exhibits 1 through 6, inclusive.

23. Documents identified at the deposition of W. G. Baird, Jr., taken in Chicago, Illinois, on December 6, 1956, and marked for identification as Baird and Warner Exhibits 1 through 9, inclusive.

24. Documents identified at the deposition of A. A. Wilbur taken in Chicago, Illinois, on December 6, 1956, and marked for identification as Wilbur Exhibits 1 through 5, inclusive, together with the reverse sides of exhibits identified by letters added to the numbers of the exhibit.

25. Letter from Albert A. Wilbur to Hugh W. Cross dated July 19, 1955.

26. Documents identified at the deposition of Clarence W. Diver taken in Waukegan, Illinois, on December 14, 1956, and marked for identification as Diver Exhibits 1 through 21, inclusive.

27. Copy of Quit Claim Deed from Marguerite K. Erickson to Hugh W. Cross and Helen M. Cross, dated October 11, 1955, conveying certain described real estate in Lake County, Illinois.

588

28. Deed dated October 11, 1955, from American National Bank and Trust Company of Chicago,

as Trustee under Trust No. 8643 to Hugh W. Cross and Helen M. Cross, conveying certain described real estate in Lake County, Illinois.

29. Trust Deed from Hugh W. Cross to Helen M. Cross as grantors to LaSalle National Bank, as Trustee, of certain described real estate in Lake County, Illinois, dated November 9, 1955.

30. Deed dated July 18, 1956, from LaSalle National Bank as Trustee to Martin E. Klein and Florence B. Klein conveying certain described real estate in Lake County, Illinois.

31. Documents identified at the deposition of John M. Barney take nin Chicago, Illinois, January 9, 1957, and marked for identification as Harris Exhibits 1 through 6, inclusive.

32. Documents identified at the deposition of John Kapel taken in Chicago, Illinois, on January 9, 1957, and marked for identification as LaSalle Exhibits 1 through 6, inclusive, including the reverse side and related exhibits identified by letters added to the number of the exhibit.

33. Documents identified at the deposition of William G. Higginbotham taken in Chicago, Illinois, on January 9, 1957, and marked for identification as LaSalle Exhibits 7 through 11B, inclusive, including the reverse side and related exhibits identified by letters added to the number of the exhibit.

34. Documents identified at the deposition of George Slosson, Jr., taken in Chicago, Illinois, on January 11, 1957, and marked for identification as CAA Exhibits 1 through 7, inclusive.

(*Note*: CAA Exhibits 3 and 4 were by inadvertence marked 16 and 17 which were the pages of the magazine being identified)

× 35. Undated penciled memorandum identified as Whittington Exhibit 2 at the deposition of J. F. Whittington taken in Chicago, Illinois, on January 25, 1957.

589

× 36. Documents identified at the deposition of E. M. Holt taken in Chicago, Illinois, on January 29, 1957, and marked for identification as Holt Exhibits 1 through 7, inclusive.

× 37. The 1955 dairy and 1955 appointment sheets maintained by or for Wayne A. Johnston and identified as Johnston Exhibits 3 and 4 at deposition hearings of Mr. Johnston held in Chicago, Illinois, on February 25, 1957.

× 38. Documents identified at the deposition of Benjamin E. Campbell taken in Chicago, Illinois, on March 1, 1957, and marked for identification as Illinois Bell Exhibits 1 through 3, 3-1 through 3-73, 4-A through 41W, inclusive, including the reverse sides of exhibits identified by letters added to the number of the exhibit.

× 39. Documents identified at the deposition of William F. Caspers taken in Chicago, Illinois, on March 26 and 29, 1957, and marked for identification as Ambassador Exhibits 1 through 8, inclusive, including the reverse sides of exhibits and related exhibits which were identified by letters added to the number of the exhibit.

× 40. Letter dated August 10, 1955, from D. A. Fawcett, Resident Vice President, New York Central Railroad Company and D. B. Jenks, Vice President, Chicago Rock Island and Pacific Railroad Company to Parmelee Transportation Company and others.

× 41. Documents identified at the deposition of T. E. LeSeuer taken in Chicago, Illinois, on April 26, 1957, and marked for identification as LeSeuer Exhibits 1 through 7, inclusive.

× 42. Affidavits executed by Fred G. Gurley on November 8, 1955, and November 10, 1955, and marked for identification as Gurley Exhibits 1 and 2 at the deposition of Mr. Gurley taken in Chicago, Illinois, on May 29, 1958.

× 43. Documents identified at the deposition of P. H. Sullivan taken in Minneapolis, Minnesota, on August 9, 1957, and marked for identification as Sullivan Exhibits 1 through 4, inclusive.

590

× 44. Documents identified at the deposition of John L. Keeshin taken in Chicago, Illinois, on September 11, 12 and 25, 1957, and marked for identification as Keeshin Exhibits 1 through 53, inclusive, 55, 56, 59 and 62, including the reverse sides of exhibits and related exhibits which were identified by letters added to the number of the exhibit.

× 45. Applications for certificates of title filed on behalf of Railroad Transfer Service, Inc. with the Secretary of State of the State of Illinois, executed on August 1, 1955, covering the following Ford Motor Co. country sedans, 1955 models:

Factory No.	*Title No. Issued*
U5PX-175729	R1216651
U5PX-175730	R1216652
U5PX-176229	R1216653
U5PX-176235	R1216654
U5PX-176236	R1216655
U5PX-176237	R1216656
U5PX-176238	R1216657

U5PX-176239	R1216658
U5PX-176240	R1216659
U5PX-176241	R1216660
U5PX-176242	R1216661
U5PX-176243	R1216662
U5PX-176244	R1216663
U5PX-176245	R1216664
U5PX-176246	R1216665
U5PX-176247	R1216666
U5PX-176630	R1216667
U5PX-176631	R1216668
U5PX-176632	R1216669
U5PX-176633	R1216670
U5PX-176634	R1216671
U5PX-177112	R1216672
U5PX-177113	R1216673
U5PX-177114	R1216674
U5PX-177115	R1216675
U5PX-177116	R1216676
U5PX-177117	R1216677
U5PX-177118	R1216678
U5PX-177119	R1216679
U5PX-177120	R1216680
U5PX-177121	R1216681
U5PX-177122	R1216682
U5PX-177123	R1216683
U5PX-177124	R1216684
U5PX-177125	R1216685
U5PX-177557	R1216686
U5PX-177558	R1216687
U5PX-177559	R1216688
U5PX-177560	R1216689
U5PX-177561	R1216690
U5PX-177562	R1216691

U5PX-177563	R1216692
U5PX-177564	R1216693
U5PX-177565	R1216694
U5PX-177566	R1216695
U5PX-177567	R1216696
U5PX-177568	R1216697
U5PX-178056	R1216698
U5PX-179481	R1216699
U5PX-181239	R1216700

46. Applications for certificates of title filed on behalf of Railroad Transfer Service, Inc. with the Secretary of State of the State of Illinois executed on September 22, 1955, covering the following Fruehauf Vans—1955 Models:

Factory No.	*Title No. Issued*
AV-300131	R1450691
AV-300112	R1450692
AV-300113	R1450693
AV-300118	R1450694
AV-300128	R1450695
AV-300120	R1450696
AV-300115	R1450697
AV-300121	R1450698
AV-300129	R1450699
AV-300130	R1450700
AV-300125	R1450701
AV-300119	R1450702
AV-300124	R1450703
AV-300134	R1450704
AV-300123	R1450705
AV-300116	R1469049
AV-300132	R1469051
AV-300114	R1469053
AV-300135	R1469055

AV-300127	R1484142
AV-300111	R1484144
AV-300133	R1484146
AV-300117	R1484148
AV-300126	R1484150
AV-300122	R1484152

592

× 47. Applications for certificates of title filed on behalf of Railroad Transfer Service, Inc. with the Secretary of State of the State of Illinois, executed on September 26, 1955, covering the following Edwards Vans, 1955 Models:

Factory No.	*Title No. Issued*
51226	R1467979
51227	R1467980
51228	R1467981
51229	R1467982
51230	R1467983
51231	R1467984
	R1467985
51233	R1467986
51234	R1467987
51220	R1467988

× 48. Letter of Benjamin F. Goldstein to the Honorable Richard J. Daley, Mayor of the City of Chicago dated September 24, 1955.

× 49. Annual reports to stockholders for the years 1954 and 1955 issued by the following railroads:

Atchison, Topeka and Santa Fe Railway Co.
Baltimore and Ohio Railroad Co.
Chicago and North Western Railway Co.
Illinois Central Railroad
New York Central Railroad Co.
Pennsylvania Railroad Co.

50. Documents submitted by Hugh E. Cross and taken from the files of Carrolton Farm Supply Co. or Hugh E. Cross and coded for identification as Cross Exhibits 1 through 6 and 10 through 19, inclusive.

51. Copy of proposal dated January 31, 1955, submitted by B. J. McCarthy, National Fleet Sales, of International Harvester Co. to Lasham Cartage Co., 2601 Archer Avenue, Chicago, Illinois, for Model CO-195 International Truck.

52. Copy of proposal dated March 10, 1955, submitted by National Fleet Sales of International Harvester Co. to Lasham Cartage Co., 345 Hudson Street, New York, New York, for Model CO-205 International Truck.

593

53. Copy of proposal dated March 10, 1955, submitted by National Fleet Sales of International Harvester Co. to Lasham Cartage Co., 345 Hudson Street, New York, New York, for Model A. C. 160 International Truck.

54. Copy of purchase order No. 949 from Lasham Cartage Co., 2601 Archer Avenue, Chicago 8, Illinois, under date of 4/12/55 to Carrolton Farm Supply, Carrolton, Illinois, marked Att: Mr. Hugh Cross, Jr., covering 25 International tractors Model RC-162 and 5 International tractors Model CO-205, apparently signed on behalf of Lasham Cartage Co. by E. J. Arndt.

55. Copy of dealer's order for motor truck and attachment to Springfield, Illinois, District Office of International Harvester Company executed on behalf of Carrolton Farm Supply Co. by Hugh E. Cross bearing date 4/13/55, covering 5 Model CO-205 Tractors.

V 56. Copy of dealer's order for motor truck and attachment to Springfield, Illinois, District Office of International Harvester Company executed on behalf of Carrolton Farm Supply Co. by Hugh E. Cross bearing date 4/13/55 covering 25 Model RC-162 Tractors.

× 57. Documents produced from the files of the Atchison, Topeka and Santa Fe Railway Co. in response to subpoenas duces tecum and coded for identification as SF-1 through SF-10 and SF-29 through SF-124, inclusive.

× 58. Documents produced from the files of the Baltimore and Ohio Railroad Company in response to subpoenas duces tecum and coded for identification as B & O-1 through B & O-215 and B & O-282 through B & O-294, inclusive.

× 59. Documents produced from the files of the Chicago and North Western Railway Co. in response to subpoenas duces tecum and coded for identification as NW-F-1 through NW-F-26, NW-F-48 through NW-F-53, NW-57 through NW-64, NW-68 through NW-97, NW-117-118, NW-126 through NW-369 and NW-F-161, inclusive.

594

× 60. Documents produced from the files of the Pennsylvania Railroad Company in response to subpoenas duces tecum and coded for identification as P-1 through P-48, P-38a through P-43a and P-58 through P-66, inclusive.

× 61. Documents produced from the files of the Illinois Central Railroad in response to subpoenas duces tecum and coded for identification as IC-J-1 through IC-J-3, IC-13 through IC-208, inclusive, including exhibits marked with an additional identifying letter "a".

62. Documents produced from the files of the New York Central Railroad Co. in response to subpoenas duces tecum and coded for identification as "NYC" or "NY" 1 through 352, inclusive, with the exception of NY-88, NY-89, NY-206 through NY-220, NY-336, NY-338 and NY-339.

63. Documents produced from the files of the Western Passenger Association in response to subpoenas duces tecum and coded for identification as A-1 through A-12, A-71 through A-78, A-121 through A-124, A-127, A-152, A-153, A-159 through A-300, A-312 through A-603, A-625 through A-697, A-703 through A-724, inclusive.

64. Documents produced from the files of R. E. Dean and the LaSalle Street Station in response to subpoenas duces tecum and coded for identification as LaS.-1 through LaS.-12, inclusive.

65. Documents produced from the files of the Chicago Union Station in response to subpoenas duces tecum and coded for identification as CUS-1 through CUS-12, inclusive.

66. Clipping from the Wall Street Journal of July 12, 1955, marked for identification as Padrick Exhibit 13 at the deposition of Earl B. Padrick taken in Chicago, Illinois, on April 12, 1957.

67. Copies of the following communications, "Docket and Digest" and "Proceedings of Meeting" of the Trunk Line—Central Passenger Committee and Western Passenger Association—Chicago Terminal Lines:

595

Dated	
January 29, 1949	Proceedings of meeting of January 29, 1949
May 14, 1949	Proceedings of meeting of May 13, 1949.

February 12, 1951 Proceedings of meeting of February 9, 1951.

Communication dated June 22, 1951, from Messrs. Arnold and Padrick to representatives of Chicago Terminal Lines, including Committee Report of June 18, 1951 attached:

February 4, 1954 Proceedings of meeting of January 29, 1954

August 17, 1954 Proceedings of meeting of August 11, 1954.

Communication dated January 11, 1955 from Messrs. Winkler and Padrick to representatives of Chicago Terminal Lines, including Committee Report of January 5, 1955 attached:

Docket and Digest for meeting of Chicago Terminal Lines February 1, 1955.

February 4, 1955 Proceedings of meeting of February 1, 1955.

Docket and Digest for meeting Chicago Terminal Lines June 13, 1955.

June 20, 1955 Proceedings of meeting of June 13, 1955.

September 13, 1955 Proceedings of meeting of September 9, 1955.

September 19, 1955 Proceedings of meeting of September 14, 1955.

September 20, 1955 Proceedings of meeting of September 15, 1955.

Docket and Digest for meeting Chicago Terminal Lines May 2, 1956.

May 22, 1956 Proceedings of meeting of May 2, 1956.

Docket and Digest for meeting Chicago Terminal Lines November 12, 1956.

596 November 14, 1956 Proceedings of meeting of November 12, 1956.

× 68. Copy of agreement between New York, Chicago and St. Louis Railroad Company and Parmelee Transportation Company dated March 1, 1941 and agreements supplemental thereto.

× 69. Letter dated June 3, 1953, from S. W. Bone, Passenger Traffic Manager, New York Central System to M. Markin including attachment.

× 70. Letter dated October 17, 1946 from H. W. Siddall, Chairman Western Passenger Association to C. E. Johnston, Chairman Western Association of Railway Executives.

× 71. Letter from E. B. Padrick to M. Markin dated March 8, 1955.

× 72. Copy of memorandum from E.M.H. (Holt) to E.R.C. (Comer) dated September 28, 1953, including attachment of letter from M. Markin to E. M. Holt dated September 24, 1953.

× 73. Letter from J. R. Brennan, Passenger Traffic Manager, Chicago and North Western Railway Co. to Morris Markin dated April 21, 1953.

× 74. Letter from T. E. LeSeuer, General Passenger Agent, Nickel Plate Road, to Morris Markin dated May 21, 1953.

× 75. Letter from Fred Baird, Assistant Vice President, Passenger Traffic, New York Central System, to M. Markin dated May 11, 1953.

× 76. Letter from E. R. Comer, Passenger Traffic Manager, The Pennsylvania Railroad to M. Markin and C. L. Passolt dated May 12, 1953.

× 77. Letter from A. D. Martin, General Passenger Traffic Manager, Chicago Rock Island and Pacific Railroad Co. to Morris Markin dated May 5, 1953.

× 78. Letter from A. K. Noe, General Baggage Agent, Atchison, Topeka and Santa Fe Railway Co. to W. A. Scheeder dated May 6, 1953.

× 79. Letter from George Kimbel, Passenger Traffic Manager, Illinois Central Railroad, to C. L. Passolt dated May 11, 1953.

597

× 80. Letter from R. E. Coleman, Passenger Traffic Manager, Baltimore and Ohio Railroad Co. to W. A. Scheeder dated September 8, 1954.

× 81. Letter from Fred Baird, Assistant Vice President, Passenger Traffic, New York Central System to Morris Markin dated March 24, 1955, coded Parm. 246.

× 82. Letter from I. C. Bruce, General Passenger Traffic Manager, CRI & P Ry. Co. to Morris Markin dated May 17, 1954, coded Parm. 248.

√ 83. Code of Ethics for Practitioners before the Interstate Commerce Commission adopted by the Commission effective April 1, 1955.

√ 84. 69th Annual Report of the Interstate Commerce Commission dated November 1, 1955. Printed by the United States Government Printing Office (1956).

√ 85. Organization minutes of the Interstate Commerce Commission relating to the Organization of Divisions and Boards and Assignment of Work. Copy revised to March 1, 1955, and copy revised to July 1, 1955.

√ 86. Decision of the Interstate Commerce Commission on Investigation and Suspension Docket No. 6148—Reduced Rates on Coal from the East to the Northwest—March 12, 1954.

V 87. Decision of Division 4 of the Interstate Commerce Commission in Finance Docket 18834—February 10, 1955.

V 88. Decision of Division 4 of the Interstate Commerce Commission in Finance Docket 18897—April 27, 1955.

V 89. Decision of Division 4 of the Interstate Commerce Commission in Finance Docket 19042—September 29, 1955.

V 90. Finance Docket 18866—Decision by Division 4 of the Interstate Commerce Commission—May 26, 1955; Decision by the Interstate Commerce Commission on June 22, 1955.

598

V 91. Finance Docket 18656—Deci. on by Division 4 of the Interstate Commerce Commission—March 2, 1955; Decision by the Interstate Commerce Commission on May 24, 1955.

V 92. Decision of Interstate Commerce Commission in consolidated cases 30416—Class Rates, Mountain—Pacific Territory and 30660—Class Rates, Transcontinental Rail 1950. Submitted July 11, 1955, Decided October 19, 1955.

V 93. Certified copy of pages 4509 to 4518, 4570 to 4581, 4553-4558, 4646 to 4650, 4746 and 4747 of the stenographic transcript of oral argument held in the case noted in paragraph 92 on July 11 and 12, 1955.

V 94. Decision of Interstate Commerce Commission in Case No. 31358—Chicago Burlington and Quincy Railroad Company, et al. v. New York Susquehana and Western Railroad Company, et al. Decided October 17, 1955.

Submitted on behalf of Parmelee Transportation Co., plaintiff, by its attorneys:

Lee A. Freeman
Lee A. Freeman
Thomas C. McConnell
Thomas C. McConnell
John Paul Stevens
John Paul Stevens

September 25, 1958.

599

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

LIST OF DOCUMENTS OF HUGH W. CROSS, DEFENDANT

(Filed October 10, 1958)

This defendant, Hugh W. Cross, submits to and serves upon plaintiff herein his position with reference to his intention to offer documents in evidence at the trial of this cause. The list which might be offered by this defendant will of course, depend upon the documents which may be allowed in evidence at the trial of the above cause, and this defendant reserves the right to offer in evidence at the trial of this cause documents which may be necessitated by any ruling of the court with regard to the evidence of the plaintiff.

The foregoing reservation is particularly directed at the list of documents submitted by plaintiff corporation of records of the Interstate Commerce Commission, plaintiff's list Nos. 83 through 94 inclusive. This defend-

600 ant will object to each and all of said proposed exhibits, but if allowed to be introduced in evidence, this defendant will attempt to produce and will offer in evidence, if produced, all records of proceedings of said Interstate

Commerce Commission pertaining to the railroads, transfer and trucking businesses before that body during the term of office of this defendant.

Hough & Cessna
Charles F. Hough
Charles F. Hough
William F. Coale
William F. Coale
Louis A. Witry
Louis A. Witry

John F. Gibbons
Of Counsel

601

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

LIST OF DOCUMENTS OF DEFENDANT RAILROADS AND RAILROAD PRESIDENTS

(Filed October 20, 1958)

Subject to the range of plaintiff's evidence and the extent to which inquiry into collateral issues is permitted, the defendants represented by the undersigned will make appropriate use on the trial of the documents hereinafter described or identified by code numbers adopted by plaintiff and these defendants (including duplicates otherwise coded):

Letter dated August 15, 1946 from M. Markin to H. W. Siddall.
Letter dated September 19, 1946 from L. W. Landman to H. W. Siddall.
Letter Dated October 17, 1946 from Chairman, Western Passenger Association to C. E. Johnston.
Letter dated July 29, 1947 from L. W. Landman to H. W. Siddall.

Letter dated July 30, 1947 from Chairman, Western Passenger Association to L. W. Landman.

Call for Meeting of Chicago Terminal Lines, August 7, 1947, dated July 30, 1947.

A-21 and A-22.

Estimated Profit and Loss Statement for One Year Period from July 1, 1947 to July 1, 1948, dated 8/7/47.

602 Letter dated August 8, 1947 from Chairman, Western Passenger Association, to L. W. Landman.

Parm. 244.

Letter dated December 30, 1947 from L. W. Landman to H. W. Siddall.

Call for Meeting of Chicago Terminal Lines, December 30, 1947, dated December 20, 1947.

A-20.

A-557 and A-558.

A-545 and A-546.

Proceedings of Meeting, Chicago Terminal Lines, January 16, 1948.

Letter dated January 24, 1948 from H. W. Siddall to Parmelee Transportation Company.

Letter dated February 12, 1948 from L. W. Landman to H. W. Siddall.

Letter dated February 16, 1948 from Chairman, Western Passenger Association to L. W. Landman.

A-531.

SF 17.

SF 18.

A 528.

A 529.

A-527.

SF 98.

Letter dated March 15, 1951 from W. A. Scheeder to G. R. Kimbel.

Letter dated March 12, 1951 from G. R. Kimbel to Wm. Scheeder.

NY 289.

Letter dated April 26, 1951 from Harry J. Dooley to Sid Bone.

N. W. 216.

Letter dated June 4, 1952 from C. L. Passolt to E. B. Padrick.

Parm. 234.
Parm. 235.
603 Parm. 238
Parm. 239
Parm. 240
Parm. 241
Parm. 242
Parm. 243
Parm. 231
Parm. 236.
Parm. 237.
Parm. 232
Parm. 233
Parm. 229
Parm. 230
A 396
A 397

Letter dated January 20, 1954 from Morris Markin to E. W. Padrick.

Parm. 126
Parm. 127
Parm. 128
Parm. 129
Parm. 130
A 6 (2nd)
A 7 (2nd)
A-11—also coded A 8 (2nd)
A 9 (2nd)
A 10 (2nd)
A-11 (2nd)
Parm. 206
Parm. 207
I. C. 67
I. C. 66
A 701

Letter dated March 16, 1954 from J. R. Brennan to S. W. Bone, G. R. Kimbel, S. F. G. Nelson, J. L. Sloan and E. M. Holt.

Call for Meeting of Chicago Terminal Lines, April 15, 1954, and also Meeting of Chicago Terminal Lines with Representatives of Parmelee Transportation Company, April 16, 1954, dated April 7, 1954, with attached Index of Schedules.

Proceedings of Meeting, Chicago Terminal Lines, April 16, 1954.

Proceedings of Meeting, Chicago Terminal Lines, April 26, 1954.

Parmelee Company Estimated Loss of Revenue for the Year 1954 based on the Revenue for the First Quarters for the Years 1952, 1953 and 1954, with Schedule Showing the Estimated Savings for the Year ending April 30, 1955, dated 4/26/54.

Parm. 141

Parm. 142

Parm. 140

Parm. 72 Parm. 79, both inclusive.

Letter dated May 18, 1954 from V. T. Corbett and E. B. Padrick to Members of Western Passenger Association.

Letter dated June 22, 1954 from Howard L. Willett, Jr. to H. H. Pevler.

604 Letter dated July 8, 1954 from H. H. Pevler to Howard L. Willett, Jr.

A 669 to A 672, both inclusive.

Letter dated July 23, 1954 from R. E. Coleman to R. E. Carroll.

Letter dated July 27, 1954 from H. H. Pevler to Howard L. Willett, Jr.

Letter dated August 2, 1954 to Larry N. Delp from files coded "A".

Letter dated August 2, 1954 from J. R. Brennan to Lee Landon.

Letter dated August 25, 1954 from R. E. Coleman to R. E. Carroll.

Letter dated August 26, 1954 from P. D. Carroll Trucking Co. to R. E. Coleman.

Keeshin Ex. 1 for identification.

NY 274

A 697

Letter dated August 27, 1954 from Passenger Traffic Manager to J. A. Jakes from NYC files.
SF 87
Letter dated September 1, 1954 from Gilbert T. Ayers to G. R. Kimbel.
NY 273
A 688
Letter dated September 8, 1954 from E. B. Padrick to Harry M. Delp.
NY 272
A 664
Letter dated September 10, 1954 from Passenger Traffic Manager to R. T. Anderson from NYC files.
Keeshin Ex. 11.
Letter dated September 13, 1954 from Howard L Willett, Jr. to E. M. Holt.
605 I. C. 62
I. C. 56 to I. C. 58, both inclusive
I. C. 48
Memorandum dated 9/15/54 initialed D. J. H. to J. R. K.
NY 269
CUS-10
A 556
A 652 to 654, both inclusive.
Letter dated October 1, 1954 from J. R. Brennan to Lee S. Landon.
A 661 and A 661a
I. C. 54
CUS-7 and CUS-8
A-181 and A-182
A-180
A 659
A 655 to A 658, both inclusive
A 165 to A 171, both inclusive
A 650

Letter dated December 22, 1954 from E. B. Padrick to Sidney Engelhardt.
A 359
B & O 26
B & O 29 to 31, both inclusive
B & O 27 and B & O 28
B & O 32
A 72 (2nd) to A 77 (2nd), both inclusive
A 77a (2nd)
NYC 65 to NYC 67, both inclusive
Keeshin Ex. 14.
Keeshin Ex. 7
I. C. 43 and I. C. 44
A-164
A-589
A-646 to A-649, both inclusive
N. W. 89
A 638 and A 639
A-1
CUS-5
A 350 and A 351
A 642
A 637

606 Letter dated March 4, 1955 from Howard L. Willett, Jr. to S. W. Bone.
A 636 A 349
A 348 A 643 to A 645, both inclusive.
Letter dated February 4, 1955 from S. W. Bone to Howard L. Willett, Jr.
N. W. 149 and N. W. 150
A 548 to A 551, both inclusive
A 347
A 161 to A 163, both inclusive
A 634 and A 635

Keeshin Ex. 6-A.

A 504	A 630
A 552	A 631
A 632	A 629
A 633	A 705

Letter dated May 11, 1955 to J. L. Keeshin from NYS files.

A 628	A 704, A 704a, A 704b and A 704c
A 547	A 703
A 627	NY 304
A 625	

Keeshin Ex. 19.

N. W. 117 and N.W. 118.	A 87 (2nd) and A 88 (2nd)
A 331 and A 332	A 438
A 330	A 473
N. W. 167	A 160

Revised Statement—Parmelee Bills of Chicago Terminal Lines—1951-1953-Inc.

Documents identified at the deposition of Morris Markin, except the documents marked for identification as Markin Exhibits 3, 9, 10, 18, 20, 21, 24, 25, 28, 29, 30, 42, 44, 46, 48, 49, 51, 53 and 54.

A 190, A 194, A 231 and all other letters to E. B. Padrick in September 1955 by or on behalf of each of the twenty-one Chicago terminal lines, each authorizing E. B. Padrick to sign the contract with Railroad Transfer Service, Inc. on behalf of the railroad by or on behalf of whom the letter was transmitted.

607 These defendants also reserve the right to make use of documents listed by plaintiff without here repeating the listing.

These defendants also reserve the right to file an additional list of documents which it may use should the Court

overrule objections to be made by them at the pre-trial hearing.

Floyd E. Thompson,
Philip W. Tone,
Attorneys for Defendant Railroads and Railroad Presidents,
By *Philip W. Tone*

Thompson, Raymond, Mayer,
Jenner & Bloomstein
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220
610

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

LIST OF DOCUMENTS OF THE THE NEW YORK CENTRAL RAILROAD COMPANY, ONE OF THE DEFENDANTS

(Filed October 22, 1958)

The New York Central Railroad Company, one of the defendants, adopts the List of Documents submitted by the other railroad defendants upon the same terms and conditions therein prescribed. In addition thereto, this defendant will make appropriate use upon the trial of this cause of the following documents which have been identified and coded by the parties, including duplicates thereof which also have been identified and coded:

Lettter dated January 29, 1954 from S. W. Bone to F. H. Baird.

Letter dated February 2, 1954 from F. H. Baird to S. W. Bone.

This defendant reserves the right to make appropriate use of documents listed by the other parties, including the plaintiff, without repeating the listing herein.

611 This defendant also reserves the right to revise and supplement its List of Documents should the Court overrule pre-trial or trial objections to documents listed or offered by the plaintiff.

Marvin A. Jersild
Charles I. Hopkins, Jr.
Attorneys for The New York Central Railroad, one of the Defendants
By *Charles I. Hopkins Jr.*

612

In The United States District Court
* * (Caption—No. 56 C 323) * *

LIST OF DOCUMENTS OF JOHN L. KEESHIN AND RAILROAD TRANSFER SERVICE, INC., DEFENDANTS

(Filed November 3, 1958)

The defendants, John L. Keeshin and Railroad Transfer Service, Inc., do hereby adopt the list of documents submitted by the other railroad defendants upon the same terms and conditions therein prescribed. In addition thereto, these defendants will make appropriate use upon the trial of this cause of the following documents, including duplicates thereof as follows:

Memos, notes, graphs, charts and schedules of surveys made by employees and representatives of said defendants prior to June 13, 1955, with respect to operations of transfer service between railroad stations in the Central Business District of Chicago.

There are certain issues presented by plaintiff's complaint herein which these defendants charged are not
613 material to the issue of the case, but if the Court should find said issues material, then these defendants reserve the right to present at the trial evidence and documents pertinent to said issues.

These defendants reserve the right to present in evi-

dence certain documents listed on plaintiff's list of documents, if plaintiff should fail to produce said documents.

In further preparation for trial and proposed depositions of plaintiffs, or during the course of the trial with respect to admissions by plaintiffs, it may be necessary to offer in evidence certain other documents not listed herein. These defendants expressly reserve the right to offer in evidence at the trial of this cause, additional documents which are not now available to these defendants, but which may hereafter become available through discovery and pre-trial procedures or independent investigation, and reserves the right to present at the trial of this cause such documents.

These defendants also reserve the right to file an additional list of documents which they may use should the Court overrule objections to be made by them at the pre-trial hearing.

Albert J. Meserow
Albert J. Meserow
Attorney for John L. Keeshin and
Railroad Transfer Service, Inc.,
Defendants

Albert J. Meserow
231 South La Salle Street
Chicago 4, Illinois
State 2-8500
614

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 56 C 323) * *

OBJECTIONS OF DEFENDANT, HUGH W. CROSS, TO PLAINTIFF'S LIST OF DOCUMENTS

Now Comes, the defendant, Hugh W. Cross, by Charles F. Heugh, William F. Coale, Jr., and Louis A. Witry, his attorneys, and for convenience adopts each and every ob-

jection filed by the five defendant railroads and railroad presidents to plaintiff's list of documents which plaintiff intends to offer in evidence at the trial of this cause. In addition thereto, defendant, Hugh W. Cross, objects to the following documents that plaintiff intends to offer in evidence at the trial of this cause for the reasons that such documents are immaterial, incompetent or privileged:

Numbers 1, 2, 17, 19 through 30 inclusive, 42, 50 through 56 inclusive, 83 through 92 inclusive, and 94.

Charles F. Hough
Charles F. Hough
William F. Coale, Jr.
William F. Coale, Jr.
Louis A. Witry
Louis A. Witry

615

In The United States District Court
* * (Caption—No. 56 C 323) * *

OBJECTIONS OF PARMELEE TRANSPORTATION COMPANY TO THE ADMISSION IN EVIDENCE OF DOCUMENTS APPEARING ON THE LIST SUBMITTED BY THE DEFENDANT RAILROADS AND RAILROAD PRESIDENTS

(Filed November 3, 1958)

A. The following documents are inadmissible because they contain or constitute mere estimates, opinions or conclusions rather than statements of fact:

1. Letter dated September 19, 1946 from L. W. Landman to H. W. Siddall.
2. Estimated Profit and Loss Statement for One Year Period from July 1, 1947 to July 1, 1948, dated 8/7/47.
3. A-557 and A-558.
4. Parmelee Company Estimated Loss of Revenue for the Year 1954 based on the Revenue for the

First Quarters for the Years 1952, 1953 and 1954, with Schedule Showing the Estimated Savings for the Year ending April 30, 1955, dated 4/26/54.

616 5. Parm. 140.

6. Document identified at the deposition of Morris Markin as Markin Exhibit 11.

7. Document identified at the deposition of Morris Markin as Markin Exhibit 38.

8. Document identified at the deposition of Morris Markin as Markin Exhibit 39.

9. Document identified at the deposition of Morris Markin as Markin Exhibit 40.

10. Document identified at the deposition of Morris Markin as Markin Exhibit 41.

11. Document identified at the deposition of Morris Markin as Markin Exhibit 43 A.

B. The following documents are inadmissible against the plaintiff because they contain or constitute hearsay evidence and self-serving statements not binding on the plaintiff:

1. A-21 and A-22.

2. Call for Meeting of Chicago Terminal Lines, December 30, 1947, dated December 20, 1947.

3. A-20 except the last paragraph thereof.

4. A-545 and A-546.

5. SF 17 and SF 18.

6. Letter dated March 12, 1951 from G. R. Kimbel to William Scheeder.

617 7. Memorandum dated 9/15/54 initialed D.J.H. to J.R.K.

8. Document identified at the deposition of Morris Markin as Markin Exhibit 8.

C. The purported carbon copy of a letter dated February 16, 1948 from "Chairman" to L. W. Landman,

Coded A (NS) 274 and marked "Personal" is inadmissible against the plaintiff on the ground that it constitutes a mere personal communication having no relevance to the issues in this litigation, but if relevant constitutes a mere self-serving statement in a document, the genuineness of which has not been established.

D. NY 289 is inadmissible because it is irrelevant to any issue before the court and its admission would merely tend to encumber the record.

Lee A. Freeman
Lee A. Freeman
Thomas C. McConnell
Thomas C. McConnell
John Paul Stevens
John Paul Stevens
Attorneys for Plaintiff, Parmelee Transportation Company

November 3, 1958.

619

In The United States District Court
* * (Caption—No. 56 C 323) * *

OBJECTIONS OF DEFENDANT RAILROADS AND RAILROAD PRESIDENTS TO DOCUMENTS INCLUDED IN PLAINTIFF'S LIST.

(filed November 4, 1958)

Plaintiff, purporting to respond to the order of August 1, 1958, requiring it to furnish defendants with a list of documents which it intends to offer in evidence at the trial of this case, indiscriminately included a great mass of documents having no probative value and obviously immaterial to any issue made by the pleadings in this case and otherwise inadmissible. Defendant railroads and railroad presidents object to the admissibility of the follow-

ing documents on the grounds stated:

Plaintiff's List
Paragraphs

1, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 620 — Exhibits: Miller 1-9, Cross 2, Baird 1-9, Wilber 1-5, letter 7-19-55 Wilber to Cross, Diver 1-21, Deeds of 10-11-55, Deed of 11-9-55, Harris 1-6 and La Salle 1-9 all refer to the listing for sale and sale in 1955, of the residence in Maryland occupied by defendant Cross and his wife, and to the purchase of a residence in Deerfield, Illinois, in July, 1955. There is no evidence showing that any of the railroad defendants or the railroad presidents had any knowledge of or connection with these transactions and all of said documents are hearsay as to said defendants. The documents and the testimony connected therewith relate to the issues of who owned the Maryland property, when that property was listed and why it was sold, and whether the Deerfield property was bought for a residence for Mr. and Mrs. Cross or for their daughter and son-in-law who were then in Germany. These issues are collateral to the issues made by the pleadings and will involve substantial trial time, will divert the attention of the jurors from the real issues, and will prejudice these defendants. All of these documents and the testimony in connection therewith relate to collateral issues and are immaterial.

30,33 — The deed of July 18, 1956, and La Salle 10-11B relate to the sale in 1956 of the Deerfield residence by the owners, Hugh E. Cross and Barbara Johnson, children of defendant Cross, to Morton E. Klein and Florence B. Klein. Mr. Klein is an employee of Pennsylvania Railroad. A deposition of Klein taken by plaintiff shows that Klein was

offered the property by an independent real estate broker, that he purchased the property with his
621 own funds and that he did not then have any knowledge of the history or business of Hugh W. Cross or of his identity as a former member of the Interstate Commerce Commission. These documents are immaterial. Allowing plaintiff to prove the sale of this property to Klein and coupling this with the fact that Klein is an employee of Pennsylvania would be admitting evidence highly prejudicial to all of these objecting defendants. Introduction of this collateral issue would require defendants to prove, among other things, that Klein found the house through an independent real estate broker, that he had no knowledge of the identity of the owners, and that the Pennsylvania Railroad had no knowledge of or connection with the transaction. Trial of these collateral issues would confuse the real issues, distract the attention of the jury, needlessly consume much trial time, and otherwise prejudice these defendants in nowise connected with the transaction.

2, 37 The telegram of 5-26-55 from Johnston, President of Illinois Central, to Cross, and Johnston exhibits 3 and 4, his diary and appointment sheets, contain no reference to any matter involved in this litigation and are immaterial. These documents are also hearsay as to all these defendants other than Johnston.

3 Exhibits C. & P. 1-91 are records of Chesapeake
622 & Potomac Telephone Company showing toll charges to B. & O. telephone numbers. These documents are immaterial as to all these defendants and are hearsay as to all defendants except Simpson and B. & O. R. Co.

4 Exhibits Simpson 1 and 3 are affidavits furnished by Simpson to the Senate Committee on Investigations and exhibit 2 is a letter from Simpson to counsel for this Committee. These documents are immaterial and they are hearsay as to all defendants except Simpson. Their admission would be highly prejudicial to all defendants. Exhibit 4 is a letter from B. & O. general counsel to Washington local counsel referring to excusing Simpson's appearance before Senate Committee. It is a privileged communication, is immaterial to any issue and is hearsay as to all defendants. Its admission would be highly prejudicial. Exhibit 5 is Simpson's appointment book for 1955 and exhibit 6 is his secretary's appointment book. These documents are immaterial and hearsay as to all defendants except Simpson. Exhibit 7 is the subpoena issued to Simpson by the Senate Committee and is immaterial and its admission would be prejudicial. Exhibit 8 is the subpoena duces tecum issued to Simpson in this case and is obviously immaterial.

5, 6, 623, 7, 8, 9, 13 Exhibits: Whittington 7 is Whittington's 1955 appointment book. It is immaterial and hearsay as to all defendants. Exhibit 8 is the transcript of proceedings of American Association of Passenger Officers for May 2 and 3, 1955, and is irrelevant and hearsay. Documents described in pars. 6-8 are Madison Hotel, Atlantic City, records showing presence of Mr. & Mrs. Whittington on April 8 to 11, 1955, and a letter pertaining thereto, and are immaterial and hearsay as to all defendants. Exhibits 1A-6 are Taft Hotel, New York, records showing Whittington's presence there immediately preceding Atlantic City visit,

and they, and Thompson transmittal letter of 4-8-57, are immaterial and hearsay as to all de-
10 fendants. Carpi exhibits 2 and 4 refer to complimentary letter to Holt for good job done as chairman of committee dealing with Chicago transfer problem and are immaterial and hearsay as to all defendants. Carpi 3 and 5A-5M refer to conferences and correspondence with I.C.C. commissioners respecting subject of users cleaning freight cars, and all are irrelevant and hearsay as to these defendants.

11 This letter and attachments show the composition of the Executive Committee of Eastern Railroad Presidents Conference in 1955, and the members present at its meetings. This is immaterial and hearsay as to all these defendants.

12, 14 Exhibits: Forgash 2-36 and other New York
15, 39 Telephone Company statements cover toll calls
624 and telegrams charged to telephones listed in name of Forgash and United States Freight Company in 1955. These are immaterial and hearsay as to all defendant railroads and railroad presidents. Ennis 1-10B and Youdell 1-17A are records of Washington hotels and Ambassador 1-8 are records of a Chicago hotel showing Forgash's presence on various dates in 1955. These are immaterial and hearsay as to all these defendants.

16, 17 Exhibits: Ryan 2-7 are Chesapeake & Potomac Telephone Company statements of United States Government official toll service, unidentified with any defendant, and are irrelevant and hearsay. Ryan 8-9 are I.C.C. tickets showing toll calls by Commissioner Cross to persons not identified with this litigation, and are immaterial and hearsay. Ryan 10A-10B is an I.C.C. bulletin on toll calls and

is irrelevant and hearsay. Item 17 are travel vouchers by Cross to Commission covering March 1955 trips, and are immaterial. These documents are not identified with any of these objecting defendants and are hearsay as to all of them.

18 This item is the appointment book of Perlman, NYC President, and is immaterial and hearsay as to all defendants.

19, 20, 625 Item 19 is the printed transcript of hearings before the Senate Committee involving Cross, and Item 20 are pages of the report of this Committee respecting Cross. These documents are immaterial as to all these defendants and their admission in evidence would be highly prejudicial. Item 20 is a statement of a stranger to the litigation and is hearsay as to all these defendants. Item 19 is hearsay as to all defendants except those whose testimony is reported and as to these except as to his own testimony. The fact that a Committee of the Senate conducted an investigation and held hearings as to Cross' conduct as Chairman of the I.C.C. is irrelevant to any issue in this litigation. An introduction of the fact of the hearing or of allowing the fact to get to the jury would be highly prejudicial to these objecting defendants.

21 Parmelee 1-8 are records of the Union League Club of Chicago showing that Cross was a guest there on certain days in 1955. These documents are immaterial and hearsay as to all these objecting defendants.

34 CAA 2-7 are records of Chicago Athletic Association and pages from its magazine relating to parties by Ben Regan on June 1-2, 1955. Vice-President Nixon attended the June 2 party, and

defendant Cross with many other persons attended both parties. These documents are immaterial and hearsay as to all these defendants.

35 Whittington 2 is an undated pencilled memor-
626 andum which appears to show the percentage of Parmelee charges paid by each of the Chicago Terminal Lines during a period when Parmelee served as transfer agent. It is immaterial and hearsay as to all these defendants.

36 Holt 2-7 are pencilled notes and memoranda regarding various phases of the transfer contract negotiations. They are hearsay as to all defendants.

38 Illinois Bell 1 through 4W are about 100 slips of Illinois Bell Telephone Company showing calls charged to defendant Keeshin. All of these are immaterial as to all of these objecting defendants.

40 This item is a letter of 8-10-55 from Fawcett of New York Central and Jenks of Rock Island to Parmelee and others. It is immaterial and hearsay as to all defendants.

41 Le Seuer 1 is a mimeographed letter containing certain pencilled notations which are hearsay. Le Seuer 2 consists of excerpts from a report on the June 13, 1955 meeting and is hearsay as to all defendants. Le Seuer 3-4 is correspondence regarding the Nickel Plate contract with Parmelee and is immaterial and hearsay as to all defendants. Le Seuer 5 is an internal Nickel Plate memo and is hearsay. Le Seuer 6 is a letter regarding transfer of passengers at Englewood station and is irrelevant and hearsay. Le Seuer 7 consists of
627 pencilled notes made after the termination of the Parmelee service and contains a reference to the

Senate investigation. It is immaterial and hearsay as to all defendants.

42 Gurley 1 and 2 are affidavits of Fred Gurley, Santa Fe President, furnished to Senate Committee. They are immaterial and hearsay as to all defendants except Gurley.

43 Sullivan 2-4 are internal Soo Line memoranda and are immaterial and hearsay as to all defendants.

44 Exhibits: Keeshin 1, District Court subpoena, and 2, Senate Committee subpoena, are immaterial. Keeshin 3-4, Senate Committee telegrams to Keeshin, and 5, Keeshin telegram to Committee, are immaterial and hearsay as to all these defendants and their admission would be highly prejudicial. Keeshin 8, confirmation of purchase of 50 sedans, ten station wagons and 15 tractors from Litsinger by Keeshin on June 1, 1955, is immaterial and hearsay as to all these defendants. Keeshin 9 relates to ordinary operations after October 1, 1955 take-over by Railroad Transfer Service, Inc. and is irrelevant. Keeshin 15-A is immaterial and hearsay. Keeshin 16-16C is immaterial and hearsay as to these defendants. Keeshin 17-17B are immaterial and hearsay as to these defendants. Keeshin 20 is immaterial. Keeshin 21 is memo of June 15, 1955, Keeshin to Baxter, and relates
628 to routine preparation for take-over by Railroad Transfer Service, Inc. and is immaterial and hearsay as to these defendants. Keeshin 22 is an anonymous letter and is immaterial and hearsay. Keeshin 23 appears to be Keeshin internal memo and is immaterial and hearsay as to these defendants. Keeshin 24 is post take-over letter, Litsinger to Keeshin, and is irrelevant and hearsay

Keeshin 25 and 26 are communications from Litsinger to Senate Committee and are immaterial and hearsay as to these defendants and their admission in evidence would be highly prejudicial. Keeshin 27 is Freuhauf Trailer Company—Railroad Transfer Service, Inc. sale contract of November 25, 1955 and is irrelevant and hearsay as to these defendants. Keeshin 28 is internal Railroad Transfer Service, Inc. memorandum of November 4, 1955 and is irrelevant and hearsay as to these defendants. Keeshin 29-30D and 32-32B are communications relating to details of formalizing contract between Railroad Transfer Service Inc. and the Chicago terminal lines and are immaterial to any issue made by the pleadings. Keeshin 31-31-A relate to pick-up and delivery rates and are immaterial. Keeshin 33-35 are memoranda, Baxter to Keeshin, respecting C. A. Conklin Truck Line, Inc. operations and are immaterial and hearsay as to these objecting defendants. Keeshin 36
629 is an order and appendix thereto of June 7, 1955 of Interstate Commerce Commission respecting Conklin and is immaterial and hearsay as to these defendants. Keeshin 37-37-C are Keeshin internal memoranda and are immaterial and hearsay as to these defendants. Keeshin 38 is a Keeshin internal memorandum of June 21, 1955 relating to discussions with baggage man relating to take-over prablems and is immaterial and hearsay as to these defendants. Keeshin 39 relates to formalizing contract between RTS and CTL and is immaterial. Keeshin 40-40A are unsigned handwritten notes and are immaterial and hearsay. Keeshin 41-41B is an undated memorandum from Kazanow to Keeshin and is immaterial and hear-

say. Keeshin 42 and 43 are letters in September 1955 from Fenner to Keeshin relating to labor contract for RTS employees and Keeshin 44 is a letter by Fenner to the employees respecting the contract and Keeshin 45 is a letter from Fenner of Chicago Truck Drivers, etc., Local 705, to George M. Harrison of Brotherhood of Railway, etc. Station Employees respecting Local 705 representing all RTS employees, and are immaterial to the issues made by the pleadings and are hearsay as to all these objecting defendants. Keeshin 46-50 relate to equipment purchases by Railroad Transfer Inc. following awarding of contract to RTS and are immaterial and hearsay as to these objecting defendants. Keeshin 51 with attachments relate to baggage pick-up and delivery
630 service charges following take-over by RTS and is irrelevant. Keeshin 52, 53 and 56 are correspondence with Interstate Commerce Commission respecting Conklin and are irrelevant and hearsay as to these objecting defendants. Keeshin 54 and 55 are Keeshin internal memoranda and are immaterial and hearsay as to these defendants. Keeshin 57 and 58 are Baxter memoranda respecting meetings between Keeshin and the committee of six, May 19 and June 3, 1955, and are hearsay as to these objecting defendants. Keeshin 59 is an eight page printed wage contract between RTS and Local 705 effective October 1, 1955 through September 30, 1961 and is irrelevant to the issues made by the pleadings and is hearsay as to these objecting defendants. Keeshin 60-61 relate to some transactions between Keeshin and Marshall Field & Company in the summer of 1955 and are irrelevant and hearsay as to these objecting de-

fendants. Keeshin 62 is a tabulation of dollar amounts of transactions between Truck Rail Terminals, Inc. and certain of Chicago terminal lines and is immaterial to the issues in this litigation.

45, 46, 47, 651 — The items enumerated in these paragraphs are applications for certificates of title filed by RTS with Secretary of State covering certain motor vehicles. These documents are immaterial to any issue in this case and are hearsay as to these objecting defendants.

48 — This item is a letter from B. F. Goldstein to R. J. Daley, Mayor, September 24, 1955, and is irrelevant and hearsay.

49 — This item consists of the annual reports to stockholders for 1954 and 1955 issued by the six defendant railroads. These documents are immaterial to any issue made by the pleadings and they are hearsay except as to the respective railroads.

50, 51, 52, 53, 54, 55, 56 — These documents relate to business transactions of Carrollton Farm Supply Company and Hugh E. Cross, son of defendant, Hugh W. Cross, in January, March and April 1955, and are not identified with any of the defendant railroads or railroad presidents. They are immaterial to any issue made by the pleadings and hearsay as to these defendants and their admission in evidence would be highly prejudicial to defendants.

57 — The documents in this group were selected from Santa Fe files by plaintiff during pre-trial discovery proceedings. SF 1-3 are Senate Committee telegrams and subpoena to Gurley and are irrelevant and their admission would be highly prejudicial to defendants. SF 4-9 relate to routine

matters after the take-over of the service by Railroad Transfer Service, Inc. on October 1, 1955, and
632 are irrelevant. SF 10 is an internal Santa Fe memo from Duffy to Gurley and is immaterial and hearsay as to these objecting defendants. SF 29-36 relate to formalizing the contract between RTC and CTL after the awarding of the contract to Railroad Transfer Service, Inc. and are immaterial. SF 37-85 are Santa Fe internal memoranda and unsigned handwritten notes and are all immaterial to the issues in this litigation and are hearsay as to all defendants. SF 90-94 relate to a proposed terminal charge to cover transfer service and are irrelevant. SF 95-99 are more internal Santa Fe memos and are immaterial and hearsay. SF 100-124 are documents relating to routine matters after the RTS take-over on October 1, 1955, and are irrelevant.

58 These are [illegible]uments selected by plaintiff from the files of B. & O. R. Co. B. & O. 1-12 are internal memoranda in June and July, 1955 relating principally to routine matters in preparation for take-over by RTS and are immaterial and hearsay. B. & O. 13-14 is an unsigned memorandum reporting on the June 13, 1955 meeting and is hearsay as to all these objecting defendants. B. & O. 15-17 is 1933 correspondence and is immaterial. B. & O. 18-20 is an unsigned memo on June 3, 1955 meeting and is hearsay. B. & O. 21-22 is an unsigned
633 memo on June 2, 1955 equipment inspection and is hearsay. B. & O. 23-25 are B. & O. internal memoranda and are immaterial and hearsay. B. & O. 26-32 is the Parmelee annual report and B. & O. 33-42 is a Dunn & Bradstreet report on Kee-

shin and they are immaterial and hearsay. B. & O. 43-70 and B. & O. internal memoranda and are immaterial and hearsay. B. & O. 71-76 relate to routine matters during take-over and are immaterial and hearsay. B. & O. 79-102 are pencilled notes and memoranda and are immaterial and hearsay. B. & O. 106-117 are pencilled notes and internal memoranda and are immaterial and hearsay. B. & O. 118-147 relate to routine procedures after take-over by RTS on October 1, 1955 and are irrelevant and hearsay. B. & O. 148-149 are internal memoranda and are immaterial and hearsay. B. & O. 150-151 relate to routine matters on take-over and are immaterial and hearsay. B. & O. 152 is a draft of press release and is immaterial and hearsay. B. & O. 153-157 are internal memoranda and are immaterial and hearsay. B. & O. 158-178 is the formal Railroad Transfer Service, Inc. agreement of October 1, 1955. The making of the contract is admitted by the pleadings and the details are immaterial. B. & O. 179-190 are September 1955 internal memoranda relating to routine matters connected with the take-over and are immaterial and hearsay. B. & O. 191-209 are
634 connected with formalizing the RTS contract and are immaterial. B. & O. 210-214 are August 1955 pencilled notes and internal memoranda relating to the routine of the take-over and are immaterial and hearsay. B. & O. 215 is an internal memorandum of December 21, 1951 respecting Parmelee labor problems and is hearsay. B. & O. 282-294 relate to routine matters after RTS take-over October 1, 1955 and are irrelevant and hearsay.
59 These are documents taken by plaintiff from Northwestern files. NW-F 1-4 is a four page

memorandum of Brennan reviewing for Feucht the history of the negotiations and considerations for changing from Parmelee to RTS service and is hearsay as to all railroads and as to all railroad presidents except Feucht. NW- 5-7 relate to the Senate Committee Investigation and are immaterial and hearsay. NW-F 8 and 16 are copies of a memo by Feucht reporting a telephone conversation with Cross on May 13, 1955 and are hearsay as to all defendant railroads and defendant presidents except Feucht. NW-F 9 is an internal memorandum and is immaterial and hearsay. NW-F 10 is a clipping from the Chicago Tribune of September 20, 1955 and is immaterial and hearsay. NW-F 11-15, 16A-17, 21-22 and 24-25 are memoranda from Small to Feucht and are immaterial and hearsay as to all these objecting
685 defendants except Feucht. NW-F 48-53 is a February 1946 report on an investigation of Parmelee charges and is immaterial and hearsay. NW 61-63 is a report by Small to Feucht on the June 13 meeting and is hearsay as to all these objecting defendants except Feucht. NW 64 is a memo from Brennan to Norton and is hearsay. NW 68-69 is a memo from Small to Feucht and is hearsay as to all except Feucht. NW 70-74 is a memo from Brennan to Small and is immaterial and hearsay as to all objecting defendants. NW 75 and 141 are copies of Feucht memoranda of the Cross conversation and are hearsay. NW 76-78 are internal memoranda and are immaterial and hearsay. NW 79. is a memo from Small to Feucht with a note of EJM and is immaterial and hearsay as to all except Feucht. NW 80, 81, 83, 88 and 90-97 are internal memoranda and are immaterial hearsay

as to all these objecting defendants. NW 82, 87 and 90 are memos from Small to Feucht and are hearsay as to all except Feucht. NW 130-140 are internal memoranda and are hearsay as to all these defendants. NW 142, 143 and 146 are internal memoranda and are immaterial and hearsay. NW 147 is a memo from Small to Feucht and is hearsay as to all except Feucht. NW 148-157 are internal memoranda and are immaterial and hearsay. NW 161 is a telegram from Cross to Feucht
636 May 25, 1955 and is hearsay as to all these objecting defendants except Feucht. NW 162 relates to formalizing the RTS contract and is immaterial. NW 163-4 relate to take-over procedures and are immaterial. NW 165 relates to routine matters after the take-over and is irrelevant. NW 166 is a report from Brennan to Norton on June 13, 1955 and is hearsay. NW 167-197 is a report by Winkler and Padrick to railroad representatives and is immaterial and hearsay. NW 198-199 is a letter from Seddal to Mayor Daley and is immaterial and hearsay. NW 200 is a communication by Padrick to the negotiating committee and is hearsay. NW 201-202 is a letter from Padrick to Chicago Vehicle Commissioner and is immaterial and hearsay. NW 203-208 relate to routine procedures on take-over and are immaterial and hearsay. NW 220-222 are memoranda and pencilled notes and are immaterial and hearsay. NW 224-288 relate to routine matters after take-over by RTS on October 1, 1955 and are irrelevant. NW 289-291B relate to routine change-over matters and are immaterial. NW 292-319 relate to matters following take-over by RTS and are irrelevant. NW 320-327 is a memorandum of Parmelee

service history and is immaterial and hearsay. NW 328 is a memo from Brennan to Poulson and is immaterial and hearsay. NW 329-335 relate to baggage reports in March 1954 and are immaterial and hearsay. NW 336 relates to post take-over matters and is irrelevant. NW 337-355 are internal memoranda and pencilled notes and are immaterial and hearsay. NW 356-369 relate to routine operations after take-over and are irrelevant.

637

60 This item includes documents withdrawn by plaintiff from the Pennsylvania Railroad files. P 4-5 is a memorandum on release of news of the awarding of the contract to RTS and is immaterial and hearsay. P 17-25 and 27 are internal memoranda and are immaterial and hearsay. P 26, 29-34 and 36 relate to routine matters after the takeover by RTS on October 1, 1955 and are irrelevant. P 35 is an unsigned handwritten note and is immaterial and hearsay. P 37 is a routine memo on the take-over and is immaterial and hearsay. P 38-61 are internal memoranda and are immaterial and hearsay. P 43A is a clipping from the Chicago Daily News and is immaterial and hearsay. P 62-66 relate to routine matters after October 1, 1955 and are irrelevant.

61 This item includes documents withdrawn by plaintiff from the files of the Illinois Central. IC-J 1-3 are memoranda from Trovillion to Johnston and are immaterial and hearsay. IC 13-14 is a general memorandum respecting the take-over on October 1, 1955 and is immaterial and hearsay. IC 15-27 are internal memoranda between persons other than defendants and are immaterial and hearsay. IC 28-29 are unsigned pencilled notes

638

respecting June 2, 1955 telephone conversations and IC 29a and b are unsigned pencilled notes apparently made at the June 3, 1955 meeting and all are immaterial and hearsay. IC 31 and IC 38-41 are internal memoranda and are immaterial and hearsay. IC 44 is a copy of a news item on labor wage agreement and is immaterial and hearsay. IC 45-47, 52-55 and 60 are internal memoranda and immaterial and hearsay. IC 61 is a copy of a letter from Padrick to Keeshin and is immaterial and hearsay as to these defendants. IC 63-72 are memoranda between others than defendants and are immaterial and hearsay. IC 73 is a letter relative to the settlement of the alleged Parmelee deficit of January through March, 1954 and is immaterial and hearsay. IC 74-79 are memoranda between others than defendants and are immaterial and hearsay. IC 80-108 involve routine matters after October 1, 1955 and are irrelevant. IC 109 is a letter respecting the interpretation of a clause of the RTS agreement and is immaterial. IC 110 is a memo on take-over of the service by RTS and is immaterial. IC 112 is a memorandum on giving service if RTS service is interrupted
639 and is immaterial. IC 113 is a memorandum respecting the take-over and is immaterial. IC 114 through 153 are documents relating to the formalizing of the RTS agreement and are immaterial. IC 154-156 are memoranda between others than defendants and are immaterial and hearsay. IC 157 is a copy of a communication by Parmelee to its employees and is immaterial and hearsay. IC 158-166 are memoranda between others than defendants and are immaterial and hearsay. IC 167 is a memo by RPS and pencilled notations and is

immaterial and hearsay. IC 168-196 relate to routine matters after October 1, 1955 and are irrelevant. IC 197-198 is a copy of letter of Padrick to Chicago Vehicle Commissioner and is immaterial and hearsay. IC 199-200 and 202 relate to post take-over routine and are irrelevant. IC 201 and 203 relate to routine in course of take-over and are immaterial. IC 204 relates to routine of Parmelee service and is immaterial. IC 205-208 are unsigned pencilled notes and are hearsay.

640
62 This item includes documents selected by plaintiff from files of New York Central. NYC 2 is Tribune news article on change of transfer service and NYC 1 is memo transmitting and they are immaterial and hearsay as to all these defendants. NYC 3-4 is a published baggage tariff and is irrelevant. NYC 6, 37-44, 49-58, 63, 68-72, 90-92, 192, 228-232, 251, 256-263, 265-267, 313 and 340-341 are internal memoranda between others than these defendants and are immaterial and hearsay. NYC 9-10, 11-15, 16-20, 21-22, 25, 27, 47, 79 and 149 relate to routine matters in connection with change-over from Parmelee to R.T.S. and are immaterial. NYC 23, 24 and 28-34 relate to formalizing contract between RTS and CTL and are immaterial. NYC 26, 35, 48, 59-62, 64, 93, 150-151, 160-161, 172, 176-185, 202, 203-205, 327-329 and 342 relate to routine of Parmelee operations and are immaterial. NYC 36 is Daily News item rechange of service and is immaterial and hearsay. NYC 45, 46, 221-227, 275, 297-299, 304, 316 and 323 are memoranda between others than defendants and are immaterial and hearsay. NYC 73-76, 145-148, 193-201, 233-236, 343-345 and 349-352 relate to routine matters after

take-over by RTS on October 1, 1955, and are irrelevant. NYC 77-78 relate to 1940-41 proceedings and are immaterial. NYC 80-87 is transportation notice of 5-26-55 and correspondence covering group movements of Boston Red Sox and is irrelevant. NYC 94-134 are personal notes of Bone respecting meetings of sub-committee of six railroads and are not from New York Central files and are immaterial and hearsay as to all defendants. NYC 162-171 and 317-322 refer to proposed transfer charge to be included in thru ticket charge and are immaterial and hearsay. NYC 237-242 and 300-302 relate to Senate Committee investigation of Cross and are immaterial and hearsay and prejudicial to these defendants. NYC 243-248, 249-250, 252-253, 264, 277-283 and 346 are unsigned notes and memoranda and are immaterial and hearsay. NYC 285-296 are correspondence and memoranda relating to 1951 study of transfer service and are immaterial and hearsay.

641

There are two sets of documents marked NYC 277 through 302. The second set of duplicate numbers are those taken from the New York Central files kept in New York. Of these NYC 277-282 are communications between New York Central men from May 20 to June 20, 1955 covering Chicago transfer proposals and making recommendations. All these defendants, except New York Central, object to these documents as hearsay. NYC 283-284 are duplicates of NYC 68-69 to which defendants have objected as immaterial and hearsay. NYC 285-289 of this group are internal memoranda concerning Parmelee operations and are immaterial and hearsay. NYC 290-295 are 1946 memoranda and correspondence and are irrelevant

642

and hearsay. NYC 296-297 are internal memoranda and are immaterial and hearsay. NYC 298 is a Chicago Tribune article of 12-2-55 and NYC 299 is a Chicago Daily News article of 1-20-56 and both are immaterial and hearsay. NYC 300-303 are memos relating to a routine of the change-over of service and are immaterial and hearsay.

NYC 186-188, 265-266, 307, 308-309, 310-312, 314, 315, 324-326, 330-332, 333, 334, 335-337, 347, 348 and 349 are documents bearing lower code numbers and objections to them have been made under earlier numbers.

643

63 This item includes documents taken by plaintiff from the files of Western Passenger Association. A2-5 and A12 are, respectively, proceedings of the meetings of Chicago terminal lines of 8-11-54 and 1-5-55 relating to a proposed Chicago terminal transfer charge to be included in through-ticket charge, and are immaterial to the issues made by the pleadings. A8 is proceedings of Chicago terminal lines for 4-26-54 covering many subjects and all of the report is immaterial except that referring to Parmelee coupon rates. A71-78, A121-124 and A127 are documents relating to routine matters subsequent to R. T. S. take-over on 10-1-55, and are irrelevant. A152-153 relate to negotiations of formalizing R. T. S. contract, and are immaterial. A185-186, A189 and A191-193 are documents relating to routine matters subsequent to take-over and are irrelevant. A195 relates to terminal charge proposal and is immaterial. A196-204 relate to routine matters pertaining to change-over and are immaterial. A205-208 relate to routine matters after take-over and are irrelevant.

A209 refers to routine matters on change-over and is immaterial. A210-211 relates to adjusting Parmelee charges on transfer of the remains and is irrelevant. A215-225 and A229 relate to routine
644 matters after R. T. S. take-over and are irrelevant. A226 and A230 relate to routine matters on change-over and are immaterial. A232-236 relate to routine matters after take-over and are irrelevant. A237-243 relate to routine matters of change-over and are immaterial. A245-246 and A248-249 relate to accounting on transfer of remains and are immaterial. A247 relates to a proposed terminal charge and is immaterial. A250-265 relate to routine matters and are immaterial. A266-271 relate to the proposed terminal charge and are immaterial. A272-273 is immaterial. A274-280 and A286 relate to routine matters subsequent to take-over and are irrelevant. A287 relates to Parmelee charges after R. T. S. take-over and is immaterial. A288-289 and A296 relate to routine matters on change-over and are immaterial. A290-291 relates to charge for clergy, and is immaterial. A294-295 refers to a proposed lawsuit respecting Chicago city ordinance, and is immaterial. A297 refers to routine matters after take-over and is irrelevant. A298-300 is immaterial. A312-320 relate to routine matters on change-over and to formalizing contract, and are immaterial. A321-324 relate to dealings with Parmelee in July, 1955, and are immaterial. A325-326, A327-329H, A349A and A-398-419 relate to miscellaneous routine matters and are immaterial. A360 relates to the pro-
645 posed terminal charge and is irrelevant. A420-425 relate to matters subsequent to the take-over and are irrelevant. A426-437 relate to routine

matters on change-over and formalizing agreement, and are immaterial. A439-441, A443, A447-451 and A454-466 relate to routine matters subsequent to take-over and are irrelevant. A442, A444-446, A453, A467 and A469 relate to routine matters concerning change-over and are immaterial. A470-502 and A511 relate to routine matters in formalizing R. T. S. contract, and are immaterial. A503, A508-510 and A514-518 relate to routine matters involved in change-over, and are immaterial. A519 relates to the 1954 arrangement for transferring passengers to and from Englewood Station, and A520 relates to the 1954 arrangement for transfer of baggage where there is less than a three-hour margin of time, and both are irrelevant. A521-526 and A559 relate to routine of formalizing R. T. S. contract and are immaterial. A531-546 relate to negotiations with Railway Express Agency in 1948-49 and are irrelevant. A553-554 is a self-serving letter of Markin, telling of extra Parmelee services rendered without charge, and is immaterial and otherwise inadmissible. A557-558 is a self-service Parmelee
646 letter showing an alleged investment of $2,320,000 and its 1947-48 operating results, and is immaterial and otherwise inadmissible. A561-562 relate to routine matters subsequent to take-over and are irrelevant. A564-566 is a letter from the Senate Committee returning documents produced under subpoena, and its admission would be prejudicial. A567, A569, A573-575, A577-588, A598, A601, A689 and A711-712 relate to a proposed terminal charge, and are immaterial. A568 is a document relating to subject of reducing Parmelee operating cost by limiting service, and is

immaterial. A570 is a report on payments to Parmelee and of coupons not picked up, and is immaterial. A571-572 is routine on Parmelee service in 1944 and is immaterial. A592-593 relate to post take-over routine and are irrelevant. A594-595 relates to passenger complaint in 1947 and is immaterial and hearsay. A596-597, A662, A673-678, A689 and A714-715 relate to Parmelee service routine and are immaterial. A599 and A692 relate to take-over routine and are immaterial. A717-718 is a Litsinger affidavit re Keeshin purchases, and A719 is a Litsinger letter re loan of station wagons for testing, and A720 is a statement of Trimmel re return to Litsinger of two of loaned station wagons, all prepared for and sent to the Senate Committee, and are immaterial and hearsay as to objecting defendants and their admission would be highly prejudicial to these defendants.

647 A721-723 relate to post take-over routine and are irrelevant.

64 Included in this item are documents from the files of LaSalle Street Station. LaS. 1-10 all relate to routine matters after the take-over of the service by R. T. S. on October 1, 1955 and are irrelevant. LaS. 11 and LaS. 12 are memoranda between persons other than defendants and are immaterial and hearsay.

65 These documents were produced from the files of Chicago Union Station. CUS 1-10 are memoranda between persons other than defendants and are immaterial and hearsay. CUS 11 and CUS 12 refer to R. T. S. routine operation matters after take-over and are irrelevant.

66 The clipping from the Wall Street Journal of 7-12-55 is immaterial and hearsay.

67 The proceedings of the meeting of Chicago terminal lines of 1-29-49 relating to a Railway Express proposal for taking over transfer of baggage are immaterial. The proceedings of the meeting of Chicago terminal lines of 5-13-49 refer to the possibility that a railroad may wish to make an individual contract arrangement with Parmelee. The proceedings of the meetings of Chicago terminal lines of 8-11-54 and 2-1-55 and the docket and digest and proceedings of the meetings of 5-2-56 and 11-12-56 relate to a proposed Chicago
648 terminal transfer charge to be included in the through ticket charge. The docket and digest and proceedings of the latter two meetings also deal with routine matters arising long after the take-over by Railroad Transfer Service, Inc. The proceedings of the meetings of Chicago terminal lines of 9-9-55, 9-14-55 and 9-15-55 relate to routine matters in connection with the change-over from Parmelee to Railroad Transfer and to claims for an accounting then being asserted by Parmelee against the railroads. All of these reports of proceedings are immaterial to any issue made by the pleadings.

68 The copy of agreement between Parmelee and the Nickel Plate dated 3-1-41 and agreements supplemental thereto are immaterial.

69 The letter dated 6-3-53 from Bone to Markin and attachment relate to a radio announcement congratulating Parmelee on its 100th Anniversary. They are immaterial and hearsay.

70 The letter dated 10-17-46 from Siddall to Johnston relating to Parmelee is immaterial and hearsay.

71 The letter dated 3-8-55 from Padrick to Markin is immaterial and hearsay.

72 The memorandum dated 9-28-53 from Holt to Comer is hearsay.

73, 74, 75, 76, 77, 78 and 79 649 These documents are letters of congratulations in May 1953 from employees of certain of defendant railroads to Parmelee on its 100th Anniversary. They are immaterial and hearsay.

80 This letter of 9-8-54 from Coleman to Scheeder complimenting Parmelee on the transfer of service men is immaterial and hearsay.

81 This letter of 3-24-55 from Baird to Markin commenting on Parmelee's proposal of 3-24-55 is immaterial and hearsay.

82 This letter dated 5-17-54 from Bruce to Markin thanking Markin for a luncheon is immaterial and hearsay.

83 The Code of Ethics for Practitioners before the Interstate Commerce Commission is irrelevant and immaterial.

84 The 69th Annual Report of the Interstate Commerce Commission dated 11-1-55 is irrelevant and immaterial.

85 The Organization minutes of the Interstate Commerce Commission of 3-1-55 and 7-1-55 relating to the organization of divisions and boards and assignment of work is irrelevant and immaterial.

86-94 Items 86-92 and 94 are decisions of the Interstate Commerce Commission in various cases from 3-12-54 to 10-19-55. Item 93 is a transcript of part of the oral argument before the Commission in one of these cases. The subject matter of these

cases has no relationship to the subject matter of the case at bar. The documents and the cases to which they refer are irrelevant and immaterial. On November 12, 1956, Judge Sullivan ruled that
650 plaintiff was not entitled to discovery with respect to one of the cases referred to, the so-called coal rate roll-back case, on the ground that plaintiff had shown no relationship between that case and the case at bar. Pursuant to this ruling, he overruled plaintiff's motion to compel a deponent to answer certain questions with respect to that case and quashed plaintiff's subpoena on defendant North Western calling for the production of documents relating to that case. On November 13, 1957, Judge Sullivan sustained defendants' objections to plaintiff's interrogatories seeking to require defendants to list and describe cases pending before the Commission. If the court were to permit plaintiff to introduce evidence of decisions of the Commission in matters unrelated to the case at bar, the court would also be required to permit a retrial of the merits of each of those matters pending before the Commission so that the jury could determine whether they were correctly and properly decided. If it were material that Commissioner Cross voted in favor of defendant railroads in a given matter, it would also be material that he voted against them in another matter, and it would therefore be necessary to examine each of the thousands of cases pending before the Commission during the period in question. Opening this irrelevant and collat-
651 eral inquiry would prolong the trial of this case

by months and would obviously distract the jury from the issues before it. A trial of these collateral issues would be highly prejudicial to these objecting defendants.

Marvin A. Jers d
Charles I. Hopkins Jr.
Attorneys for New York Central
Floyd E. Thompson
Philip W. Tone
Attorneys for other defendant railroads and presidents.

652

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

OBJECTIONS OF DEFENDANTS, JOHN L. KEESHIN AND RAILFOAD TRANSFER SERVICE, INC., TO PLAINTIFF'S LIST OF DOCUMENTS

(Filed Nov 5, 1958)

Now Comes, the defendants, John L. Keeshin and Railroad Transfer Service, Inc., by Albert J. Meserow, their attorney, and for convenience adopts each and every objection filed by the five defendant railroads and railroad presidents to plaintiff's list of documents which plaintiff intends to offer in evidence at the trial of this cause.

Albert J. Meserow
Albert J. Meserow
231 South La Salle Street
Chicago 4, Illinois
State 2-8500
Attorney for Defendants

653

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

MOTION OF DEFENDANT RAILROADS AND RAILROAD PRESIDENTS TO STRIKE PLAINTIFF'S LIST OF DOCUMENTS AND IN THE ALTERNATIVE FOR PRE-TRIAL RULINGS.

(Filed January 30, 1959)

Defendant railroads and railroad presidents move to strike the list of documents filed by plaintiff, on the ground that said list is not in compliance with the Court's order of August 1, 1958, requiring plaintiff to furnish defendants with a list of documents which it intends to offer at the trial, in that said list includes a great mass of immaterial and inadmissible documents which could not conceivably be received in evidence.

In the alternative said defendants move that the Court, in its pre-trial order entered after the pre-trial conference, make the following rulings:

1. Evidence of cases pending before the Interstate Commerce Commission, decisions of and hearings before the Commision in particular cases, internal functioning
654 of the Commission or a Division thereof, organizational minutes of the Commission, and the code of ethics for practitioners before the Commission, including Items 83-94 of Plaintiff's List of Documents submitted in response to Order of August 1, 1958, is irrelevant and immaterial and will not be admitted in evidence at the trial.

2. Evidence that the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate conducted an investigation of

the conduct of defendant Cross as an Interstate Commerce Commissioner or that the Subcommittee rendered a report to the Senate on the subject, or of the contents of that report is irrelevant and immaterial and will not be admitted in evidence at the trial. Plaintiff will not be permitted to advise the jury in any manner that such an investigation was conducted or such a report rendered. The text of Item 19 (the transcript of hearing before Senate Subcommittee) may be used or offered in the same manner as any other extrajudicial statement, but it may not be used or offered in such a manner as to disclose to the jury that the hearing was held before the Senate Subcommittee. Items 19 and 20 (the printed transcript of hearings and the printed report of the Senate Subcommittee) will not be admitted in evidence at the trial.

3. Evidence of the sale of the residence occupied 655 by defendant Cross and his wife in Maryland and the purchase of the residence in Deerfield, Illinois which the Crosses subsequently occupied, including Items 1, 22-29, 31-33 (except LaSalle Exhibits 10-11B) on Plaintiff's List of Documents, is collateral to the issues made by the pleadings and immaterial and will not be admitted at the trial.

4. Evidence of the sale of the Deerfield residence to Morton Klein and Florence B. Klein, including Item 30 and LaSalle Exhibits 10-11B in Item 13 on Plaintiff's List of Documents, is collateral to the issues made by the pleadings and immaterial and will not be admitted as the trial.

5. Evidence of the sale by Carrollton Farm Supply Company of certain trucks to Lasham Cartage Company and quotations received by the latter company from International Harvester Company on certain trucks, including Items 50-56 on Plaintiff's List of Documents, is irrelevant and immaterial and will not be admitted at the trial.

6. Evidence concerning the negotiation of the formal contract with defendant Keeshin or defendant Railroad Transfer Service, Inc. after the award of the contract on June 13, 1955 is immaterial and will not be admitted at the trial.

7. Evidence, including routine correspondence and memoranda, relating to the details of the change-over
656 of the transfer service from plaintiff to Railroad Transfer Service, Inc. after the award of the contract on June 13, 1955 is immaterial and will not be admitted at the trial.

8. Evidence concerning the operation of the Chicago transfer service by Railroad Transfer Service, Inc. after October 1, 1955 is irrelevant and immaterial and will not be admitted at the trial.

9. Evidence relating to the proposed terminal transfer charge to be passed on to passengers, which the railroads have considered from time to time before and after the change-over from plaintiff to Railroad Transfer Service, Inc. and which has never been adopted, is irrelevant and immaterial and will not be admitted at the trial.

10. Evidence concerning attendance by individual defendants or by officers or employees of defendant railroads at meetings or conferences which have not been identified with or shown to be related to the subject matter of this action is irrelevant and immaterial and will not be admitted at the trial.

11. Records of telephone calls will be admitted in evidence only if there is evidence identifying the calls to which the records refer with the subject matter of this case.

12. Plaintiff may make an offer of proof of any of the foregoing evidence in writing. The offer may be
657 filed before trial or at any time before plaintiff rests

its case. No offer of proof may be made in the presence of the jury.

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By PWJ
Charles J. Hopkins, Jr.,
By PWJ
Attorneys for New York Central Railroad Company
Floyd E. Thompson,
By PWJ
Philip W. Tone
Attorneys for other Defendant Railroads and Presidents

Of Counsel
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135 South LaSalle Street
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658

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

ADOPTION AND JOINDER BY JOHN L. KEESHIN AND RAILROAD TRANSFER SERVICE, INC., DEFENDANTS HEREIN, IN MOTION OF DEFENDANT RAILROADS AND RAILROAD PRESIDENTS, TO STRIKE PLAINTIFF'S LIST OF DOCUMENTS AND IN THE ALTERNATIVE FOR PRE-TRIAL RULINGS.

(Filed February 11, 1959)

Now comes John L. Keeshin and Railroad Transfer Service, Inc., defendants in the above cause, and do hereby move the Court as follows:

1. Defendant railroads and railroad presidents on January 29, 1959, did file a motion with the Clerk of the above Court to strike plaintiff's list of documents, and in the alternative for pre-trial rulings, and a Brief in support of said motion.

2. These defendants do hereby join in and adopt said motion in their behalf, to strike plaintiff's list of documents and in the alternative for pre-trial rulings, and do hereby join in and adopt said defendant's Brief 659 in support of said motion.

Albert J. Meserow
Albert J. Meserow
Attorney for John L. Keeshin and Railroad Transfer Service, Inc., Defendants

Albert J. Meserow
231 South La Salle Street
Chicago 4, Illinois
State 2-8500

659

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

ADOPTION AND JOINDER BY HUGH W. CROSS, DEFENDANT, IN MOTION AND BRIEF ON BEHALF OF DEFENDANT RAILROADS AND RAILROAD PRESIDENTS, TO STRIKE PLAINTIFF'S LIST OF DOCUMENTS AND IN THE ALTERNATIVE FOR PRE-TRIAL RULINGS.

(Filed March 4, 1959)

There have been filed herein a motion and brief in support thereof of Defendant Railroads and Railroad Presidents to strike plaintiff's list of documents, or, in the alternative, for certain pre-trial rulings. This defendant,

Hugh W. Cross, adopts said motion and brief, and in addition to the grounds stated in said motion, claims that any decisions of and hearings before the Interstate Commerce Commission, of which this defendant was a member, or of any other matters connected with the said Commission were and are privileged.

The plaintiff has included in its list of documents to be offered in evidence at trial, documents pertaining to 661 cases pending before said Commission, including decisions of and hearings before the Commission in particular cases, documents relating to the internal functioning of the Commission or a division thereof, and organizational minutes of said Commission while Defendant, Cross, was a member thereof. Plaintiff's purpose in offering this evidence will be to attempt to create an inference that Cross improperly decided certain particular cases selected by plaintiff in favor of the defendant railroads in consideration for their awarding the Chicago transfer contract to Keeshin.

Cross was appointed a member of the Interstate Commerce Commission in 1949 and did not become Chairman of the Commission until July 1, 1955, after the Chicago transfer contract had been awarded to Keeshin. The Commission has and had eleven members and Cross, before being chairman, was a member of one of the divisions.

After the many years Cross had spent in public service without any accusations of improper conduct and without any shadow on his record, the charge has now been made that he, for a valuable consideration, influenced the Defendant Railroads to award the Chicago transfer contract to Keeshin. There is no allegation of what the consideration was supposed to be, but the plaintiff asks the court 662 and jury to assume from a decision or decisions in favor of the Railroads that there must have been a consideration.

It would be to the best interests of Cross to publicly clear his name of these charges and the best possible way would be to have a full hearing at trial, not only on the documents but on all matters in which he participated while a member of the Interstate Commerce Commission. However, this procedure would be very costly, time consuming and would confuse the real issues.

If plaintiff company is allowed to proceed on its theory that if there were a decision in favor of the defendant railroads, or any one or more of them, by the Interstate Commerce Commission, such would show there must have been a valuable consideration. This would be new and would subject all tribunals to the necessity of defending their decisions in all cases. We all know that some minds believe that if a case is lost the tribunal was paid off, yet, to say the least, such is not an established doctrine. And here, the defendant, Cross, was only one member of eleven of the Commission. Such conclusion is based upon a virtual impossibility.

Therefore, this defendant, Hugh W. Cross, claims that the documents listed in plaintiff's list and other matters connected with the Interstate Commerce Commission 663 are immaterial and irrelevant and are also privileged and should not be admitted in evidence at trial. The Court should rule on their admissibility at this time.

Charles F. Hough
Charles F. Hough
William F. Coale, Jr.
William F. Coale, Jr.
Louis A. Witry
Louis A. Witry
Attorneys for Hugh W. Cross

1 IN THE UNITED STATES DISTRICT COURT

* * (Caption No. 56 C 323) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause at a pre-trial conference in the chambers of the Hon. Edwin A. Robson, one of the Judges of said Court, in the United States Court House, Chicago, Illinois, on Monday, May 11th, 1959, commencing at 10:15 o'clock a.m.

Present:

Mr. Leo A. Freeman, (Suite 514, 105 South La Salle Street, Chicago 3, Illinois),

Mr. Thomas C. McConnell, and
Mr. Francis J. McConnell, (Suite 1110, 134 South La Salle Street, Chicago 3, Illinois),

Mr. John Paul Stevens, (Suite 820, 105 South La Salle Street, Chicago 3, Illinois), and

Mr. Herbert B. Lazarus, (1501 Broadway, New York 36, New York),
appeared for Plaintiff:

2 Messrs. Thompson, Raymond, Mayer, Jenner & Bloomstein, (Suite 3300, 135 South La Salle Street, Chicago 3, Illinois, by
Mr. Floyd E. Thompson and
Mr. Philip W. Tone,
appeared for defendant railroads and railroad presidents:

Mr. Albert J. Meserow, (Suite 1353, 231 South La Salle Street, Chicago 4, Illinois),
appeared for defendants John L. Keeshin and Railroad Transfer Service, Inc., and
Mr. Charles F. Hough and

Mr. Louis A. Witry, (Suite 2600, 135 South La Salle Street, Chicago 3, Illinois),
appeared for defendant Hugh W. Cross.

(The Court gave attention to other matters on the call, after which the following proceedings were had herein, to-wit:)

The Clerk: 56 C 232, Parmelee Transportation Company against John L. Keeshin, et als, for pretrial conference.

The Court: Are the parties ready to proceed?

Mr. Thompson: I do not see Plaintiff's attorneys here.

Mr. Thomas McConnell: We are here, your Honor. Mr. Freeman is coming in now.

Mr. Freeman: Good morning your Honor.

The Court: Good morning. I thought that before we proceeded into the pre-trial there is a statement I should make. I spent the week-end going over the record in this case.

I notice that there has been a lot of innuendo and a lot of talk, and so that there can be no question about the attitude of the Court or any connection with this case I thought it should be stated plainly for the record so that you gentlemen could take any matter that I might state into consideration.

As far as the Defendant Hugh Cross in this case is concerned, I first met him probably in 1935 when he was down in the Legislature. I knew him as Speaker of the House. I became quite friendly with him.

I knew him as Lieutenant Governor. I helped handle parts of his campaign the same as any Republican Party member would do in causes of this kind.

When I left the practice of the law and my work in connection with the County Board—I might say that I

met his as Attorney for the County Board handling their legislative maters. I knew his wife, I knew his son, and I had dinner with him from time to time. I had never been in his home and he had never been in my home.

After I went on the bench I probably saw him twice and that was within the first two years that I was on the bench. As far as I can recall I have not seen him since the year 1947.

There is some mention, I find in the record, about the United States Senator and about Mr. Rainville, his Administrative Assistant. I want to state that I have known both of those gentlemen for a long time. I want all of you to be aware of this fact, particularly in view of the fact that there is litterness in this case and there have been some problems which have come up during the course of it.

It might go to my qualifications and I have been in this game too long to have statements — I can't prevent them, but any that I can prevent I want you gentlemen to be aware of and if this raises any question either in any of the Plaintiffs' minds or any of the Defendants' minds as to my competency or my fairness in handling this case, because I call them as I see them, I feel that it is necessary that you gentlemen, if you are not aware of it, should be made aware of this factor so far as the case is concerned.

Now, if you want to consider that as to whether or not you feel this Court should disqualify itself, I want that understood at the outset before we go into it so that no question in the future can come up on it.

Mr. Thomas C. McConnell: Speaking for the Plaintiff, we don't have to consider it. We have no question at all about it.

Mr. Thompson: Speaking for the Defendants, we certainly do not have, because if there is any Judge

on the bench here that does not know some of these people, then he must have been living in a vacuum somehow.

The Court: Well, I wanted the whole thing made clear here so that no question could possibly come up in the future on it.

Mr. Thomas C. McConnell: There will not be any question from us.

Mr. Freeman: None whatever.

The Court: This is a case in which, apparently, some bitterness and some animosity may arise during the course of it. However, you are all able lawyers, and I expect you will conduct the matter in the same way that every lawsuit is conducted, but I felt it incumbent after going over this record that I make this statement.

Mr. Hough: May I make this statement, Judge Robson.

The Court: Yes.

Mr. Hough: I represent Hugh Cross. You have made this statement, and I have known you for a long time, and I would just like to think it over for a few minutes as to whether I wouldn't be convinced that your Honor is such a type that having been on the team, if you want to put it that way, that you might lean over backward against me.

The Court: Well, what I have stated are the facts, and I thought you gentlemen should be aware of it.

Mr. Hough: That is what is bothering me right now.

The Court: You know of some of my connections with Hugh Cross in the past.

Mr. Hough: I know.

The Court: As I say, I haven't seen him for over ten, maybe it is twelve years. I felt all of you should be aware of that factor, because I feel you are entitled to know that.

Mr. Hough: I am a little worried because of your

extreme honesty, and I would like to think it over a few minutes.

The Court: All right. We will recess for a short time and you gentlemen can discuss it, but I wanted that clear for the record so that you would all know about it.

Mr. Thompson: Two minutes you say you want?

Mr. Hough: No. I am very serious.

The Court: All right. We will recess for fifteen minutes.

(Whereupon a fifteen minute recess was taken, after which the following further proceedings were had herein, in chambers, to-wit:)

The Court: Mr. Hough, do you have a statement you want to make?

Mr. Hough: When your Honor made that statement, obviously I have quite a responsibility to Hugh Cross and I simply wanted to give it some consideration. After consideration, the Defendant Cross is ready to proceed.

The Court: I wanted you to be sure, as I did all parties. You probably know the background, during the time he was in active politics, of my relations with Hugh Cross better than anybody else, and I wanted you as well as the other parties to feel satisfied in your own mind -- I do not want the question to come up later on -- that you feel in good conscience with the facts I have put before all of you, that you want me to proceed with the case.

Mr. Hough: I am ready to proceed.

The Court: Is that true of all of you gentlemen?

As I said, I wanted it before everybody so in good conscience you could recommend to your clients that I should proceed with the case. I wanted that clearly understood.

Is there any question in anybody's mind on it? If so, I want you to state it freely.

Mr. Thomas C. McConnell: I did not have any question in my mind about it. I consulted with the other counsel in the case and they didn't either, so there isn't the slightest question on this side of the table about your Honor's fitness, or having you proceed with this case, not only now but you will never hear anything from this side of the table at any future time.

Mr. Thompson: The same is true for this side of the table.

The Court: Well, then we can proceed to discuss the matter of proceeding here today. Now, I do not know whether it would be more convenient with the lectern in the court room. I prefer the informal type of discussion, but with a lectern with each side having an opportunity to make their statements, if it would be easier to proceed out in the court room we can do that.

What do you feel would be the best for the parties here? Would you rather do it with the lectern? I would rather give each one their opportunity in turn. Because this motion was made by the Defendants they would have the right to make an opening. I do not know whether one is going to speak for all or each one wants to have his opportunity.

As I see this, first we come into the broad area on the limitation of proof, that is, the broad discussion, and then after considering that area we come down to the specifics as alleged by each of the parties, and then after that is considered we come into the documentary proof as offered by the respective parties and as to what should be done within those areas.

For the convenience of you gentlemen we can work out the ground rules either of proceeding in the court room with each one having an opportunity to discuss it or we can proceed in a more informal manner here, and I leave it up to you to decide on that.

Mr. Thompson: Well, speaking for the movants in this case, the arrangement which seems to me would
11 be best for the Court and perhaps all concerned, as I view it, would be to have each segment of these motions considered separately and concluded.

In other words, on the question, as you say, of the propriety of a ruling at this stage, you can hear each side on that question, and on the question of the ICC documents, you can hear each side on that question.

That being true, it seems to me that the informal proceeding in chambers would be much more convenient; otherwise I would have to be coming up to the lectern and then I would have to retire about twenty times, and it seems to me that is altogether unnecessary. As I view it, I think the informal procedure with your Honor calling the strikes would be best.

The Court: Which way would you prefer?

Mr. Thomas C. McConnell: I do not care. It does not make any difference.

The Court: Is the informal proceeding satisfactory?

Mr. Thomas C. McConnell: Yes.

Mr. Freeman: Yes.

The Court: Well, then, we can proceed in that
12 way. We will start in just a minute, gentlemen.

(There was a short interruption, after which the following further proceedings were had herein, to-wit:)

The Court: All right, gentlemen. You may proceed.

Mr. Meserow: If your Honor please, I would like to make just one observation.

The Court: All right.

Mr. Meserow: I represent Mr. John L. Keeshin and Railroad Transfer Service, Defendants in this case.

In the interest of time, because the issues as to all of

the Defendants are pretty much the same, in the interest of saving time I think Judge Thompson can adequately present the issues and our position in this matter.

The Court: Are you speaking on behalf of all them, Mr. Thompson?

Mr. Thompson: Well—

The Court: Or do you wish to be heard separately, Mr. Hough?

Mr. Hough: No. I do not want to be heard sep-
13 arately. As a matter of fact, I may not remain here. I am represented by Mr. Witry over here (indicating Mr. Witry).

The only time that I might want to comment would be very brief, if it arises, as to the attack upon Hugh Cross personally. I might want to comment on that, but other than that, no.

Mr. Thompson: I do not see how that question can possibly arise in this pre-trial conference. We are considering here questions of law, not fact.

Mr. Hough: That is right.

The Court: All right. I think with that understanding and with the memorandum we have before us we can first go into the broader area of the question of limitation of issues as it is presented more or less in order in your motion, in the original motion, in your reply and then the Plaintiff's reply to your original motion. You may proceed.

Mr. Thompson: If the Court please, the matter of the order of August 1, 1958, seems to me needs no discussion. The order speaks for itself, and the purpose of the order, it seems to me, was obvious when entered and is still obvious.

14 Now, the first question, I assume, from what your Honor has said is the question of the propriety of consideration of these specific limitations that we have presented by our motion and our supporting briefs.

The question of ruling on the admissibility of a particular item of evidence, or in this case groups of documents which cover a particular item of evidence, is one that presents itself only when there are no issues of fact so that the Court is in as good a position to rule at a pretrial conference as he is at the trial.

In other words, if the facts are not in dispute and the issue is clear as to whether or not that particular item of evidence should be received, then I should think that it is not only proper but very desirable that the ruling be made before trial.

If it is something that is not to be received under any circumstances then, of course, it ought not to be offered in open Court, there should not be any mention made of the subject in the opening statement, there should not be any offer of evidence in the presence of the jury, and all in all the matter should be eliminated not only in the interest of orderly procedure at the trial, but also in the interest of preparation for trial.

Now, we think the question is rather clear here that the different groups of documents which in effect represent a particular segment of evidence, are respecting issues which are not in dispute.

In other words, take the Interstate Commerce Commission proceedings; there is no dispute that they had such proceedings, there is no dispute that decisions were made and there is no dispute that Cross was on the Commission, and so on through the whole series of documents and evidence relating to Interstate Commerce matters.

That question is as clear to the Court today as it could possibly be during the course of the trial. Either these proceedings are to be inquired into or not on the question of whether they are relevant, in the first place, to the issues made by the pleadings; and in the second place

whether, if relevant, they have probative value and also whether the cost of receiving any such evidence, the penalties of diverting attention of the jury from the
16 real issues in the case and all those things, the implications arising from it, outweigh whatever value they may have. I use that only as an illustration.

The same thing is true with some of the other groups as we will speak of them, as we come to the other groups.

Now, to say that these things cannot with propriety be ruled upon before trial it seems to me to be destroying the very purpose of a pretrial conference. The purpose of it is to limit the testimony to the matters that are appropriate subjects of inquiry, and to advise the respective parties of the issues that will be tried.

They have been limited many times in many jurisdictions where the Court has dictated the issues that would be tried, and in this case that is exactly what we are asking for, for the Court to set up by pretrial rulings the limitations on the character of evidence that will be received.

Now, they say that first we have to know what the issues are. Counsel says that this complaint charges a conspiracy to restrict freedom of bidding and to
17 create a monopoly of bidding in Keeshin. Now, of course, a charge of a conspiracy does not prove it. They have to prove it before they can produce any evidence of what would otherwise be hearsay, and the relevancy of the evidence to that issue, it seems to me, is rather narrow.

There is no other issue. There can be no issue that because this was an exclusive contract it is a violation of the anti-trust laws. The Supreme Court has decided more than once that that is not a basis for allegation of violation of the anti-trust law.

It is also equally well settled that the fact that all of

the railroads acted together in making a contract essentially one that would have to be made in such fashion does not in itself make it an unlawful transaction.

Therefore, the issue is limited to the question of whether or not these folks conspired to fix restrictions or restraints that are unlawful in the matter of receiving and considering bids that were made for this service.

Both contending parties, as it ultimately turned out — there were invitations, as your Honor knows, to many
18 people, and I assume many of them considered the matter more or less, but it wound up with two competitors. Each was competing for exactly the same thing, namely, a five-year contract for rendering this service at a stated cost and under stated service conditions, so there is no question about the fact that each was asking for an exclusive contract and there was no question but what each was asking the railroads to act in concert in granting the contract.

Now, that being true, the issues being thus limited, and it seems to me very limited in this case if the case is held within the proper limits, the issue is rather narrow; and that being true, we have to find evidence that is relevant to prove that these people did conspire and you can't prove it backwards. You cannot make hearsay evidence competent by using hearsay evidence to establish the premise for its competency.

Now, that, I think, is all that is necessary to be said on the over-all subject. I think we come to the question of —

The Court: Let me ask you a question.

Mr. Thompson: (Continuing) — these specific things, and I can be more specific about it.

19 The Court: Let me ask you a question within that area, and your briefs do not touch on it to any great extent, neither side's briefs, although the Defendants

have mentioned it: What about within the areas of rebuttal?

The Plaintiff puts on his case, and then there is certain evidence that comes in and they feel it is necessary to use it in rebuttal to what you have introduced. If I were to prescribe limitations and then it becomes apparent on the basis of the allegations of the complaint, the answers that are filed and the interrogatories, that certain areas of this are necessary for rebuttal, and if I would limit at this time the issues that might be affected by your case, when the defense is put on, what would be the attitude and what would be the effect of restricting?

Now, I am considering the elements here of the railroads and the conversation, as an example, the statement that Johnston had heard that Cross was going to be put on in an executive position, and certain areas come out in the Defendants' case either on cross examination or on direct examination, or the areas here that we find as to the decisions of the Interstate Commerce Commission or the relationship of Keeshin and Cross.

That is one factor that has gone through my mind in going through the memoranda and in going through the exhibits, that there might be an area where there is a necessity as a result of the Defendants' case.

Mr. Thompson: Well, it seems to me that the answer to that is this: Your Honor rules now that a certain area of evidence is irrelevant and does not support any of the issues made by the pleadings, which is where we are at this stage.

The Court: That is correct.

Mr. Thompson: Then if at the close of the Plaintiff's case the Plaintiff has made such a case that the Defendants need to put on any defense then, of course, the defense will be made.

Now, the ruling we are asking for is that these things

shall not be in the first instance received on behalf of the Plaintiff as relevant evidence and that, of course, I assume as the Plaintiff's case develops might present a situation where a change would have to be made in the ruling, and we provide that they may make offers
21 of proof but they must be made in writing either before the trial or at the trial so that they are not made in the presence of the jury, and if the Court then finds that that offer of proof by virtue of something that has happened on the trial opens up an area which in the first instance has been held to be irrelevant or outside of the scope of the pleadings, of course, the Court always has the matter in his control.

The fact that the Court makes a ruling now or makes it the first day of the trial does not affect the Court's power to change that ruling the second day of the trial.

The Court: No. The thing I am thinking of is the area of discovery which is necessary. The Rules of the Federal Court are very liberal within that area.

I believe we should restrict every case as much as possible and get down to what the issues are, but one factor is within the area of discovery preparing their case, and if I limit it to an extent and then it does come in as a part of your case with the amount of evidence apparently that will go on, there is a question of whether I will
22 prevent the Plaintiffs, assuming that there is no ruling in your favor at the close of the Plaintiff's case, whether I would have unduly restricted them within these areas and that is one factor that the briefs, while they touch on it, do not consider and I think it is a factor in an effort to limit the issues, and that we must also consider that phase of Plaintiff's case.

Do you understand what I mean by that?

Mr. Thompson: Yes, but there is no question here of limitation of discovery.

The Court: No.

Mr. Thompson: They have been all over the lot on that.

The Court: Well, with respect to that, I do not know how far they have gone.

Mr. Thompson: Well, it is —

The Court: I have enough before me. There are 4500 pages of discovery.

Mr. Thompson: As far as I know discovery is completed, unless the Court —

The Court: I was told by you that you need another two years of discovery unless it was limited here. Is that correct?

23 Mr. Thompson: I was just about to say —

Mr. Thomas C. McConnell: That is a very conservative statement.

The Court: Well, go ahead. I just wanted to interject that. Go ahead.

Mr. Thompson: I was about to answer your Honor, until I was interrupted.

The Court: Go ahead.

Mr. Thompson: I was about to say, if the Court holds at this stage, and certainly this is the stage to make the ruling, that we are going to try all the cases that were tried before the Interstate Commerce Commission during the year 1955, then I don't know how long discovery will have to be.

Now, of course, it seems to me it is as clear as any question could appear that these Interstate Commerce proceedings and all the matters relating to the Interstate Commerce actions are irrelevant to any issue. They prove nothing as to whether or not a conspiracy existed or whether or not there were acts done in furtherance of the conspiracy.

Now, their suggestion is that they be allowed to 24 show that there were thousands of cases pending

before the Interstate Commerce Commission, that millions upon millions of dollars were involved and the very economic life of the railroads rested in the control of the Commission, and having proven that that then the Court shall rule it will be irrelevant and the Court will not listen to evidence as to whether Cross decided correctly or incorrectly in these cases.

Now, if the decision, or the proceeding, even, is presented, obviously the jury can draw no other conclusion except that it does have some relevancy to the issues in this case, and the jury will then necessarily jump to the conclusion that Cross's conduct was venal in all these matters as a member of the Commission unless we prove that it was not.

Now, if we are allowed to prove that every decision he made was a correct decision, then, of course, there could not be anything wrong with his conduct, but how are you ever going to prove that to a jury?

You can't even prove it to a Court a lot of times, as to whether the Commission's decision is right or wrong. After all, it involves things no jury could possibly pass on.

Now, on the other hand, if they can present to the jury the fact that the B. & O. Railroad had pending before the Commission the ex parte matter of approving the issuance of new securities in this tremendous refinancing program, one of the largest, so they say in their brief, and I accept that, of any financing ever done by any railroad, what position will we be in?

In other words, the B. & O. in a favorable market was issuing new bonds to replace old bonds. Now, it was purely ex parte. It did involve millions of dollars. If the jury were told that the case was pending and that there were contacts and conferences between the members of the Commission and the financial officers and executives

of the B. & O. in the course of dealing with that purely ex parte matter — nobody had any interest in it except the public, outside of the railroad, and the sole purpose, I assume, of giving the Interstate Commerce Commission jurisdiction in such matters to approve securities is to be sure there is no monkey business which affects the public interest or which jeopardizes the financial
26 situation of the railroad or which involves some juggling of securities for the private benefit of somebody to the injury of the railroad and the public.

Now, it is purely ex parte. It is perfectly obvious to all lawyers that know anything about it that those things are carried on back and forth by information being exchanged in bringing about the formal set-up of this refinancing, but the jury does not know it and all of the denials and all of the explanations to the jury would never remove from their minds that there was an opportunity involving millions upon millions of dollars for corruption and therefore, the Court having received it, corruption must have existed or the Court never would have allowed it to come in.

That is just an example of what these things may be. They have listed here a half a dozen matters in one of their answers to interrogatories. I do not even know what some of them are by their description, but I am sure all of them involve vast sums of money. They were of economic interest to the railroads. There were
27 some of them in which the interest of one railroad was different from the interest of another.

If you are ever going to open up this question of receiving any evidence of any action by the Interstate Commerce Commission, it seems to me that we have thrown the thing wide open to any proceeding. What the end would be I don't know. I am sure the jury could not ever get the thing untangled and the Defendants

wouldn't know where to stop in proving that there was no corruption, that there was no corrupt decision in their favor.

I do not know how else you would meet the innuendo that comes from the very fact the evidence was presented. Now, the Court is in just as good a position to rule on that today after these questions that are in the Court's mind are resolved, as it will be on the trial. There is not going to be any change in the facts. The facts are all admitted.

There isn't any question but what these proceedings were pending. There isn't any question but what Cross was a Commissioner. There isn't any question about these other issues, as to whether or not there were con-
28 versations between the B. & O. people and the Commissioners and the officers of the Commission and Cross himself. Now, is that admissible?

There is no question but what all these other matters were pending before the Commission. Now, what the decision was, just to admit the decision in evidence, what does it prove? It proves absolutely nothing unless the decision was an evil decision and obviously wrong, and of course, Cross could not decide it by himself.

I think that the Interstate Commerce Commission, so as not to confuse some of these other things we are going to talk about, points up perhaps more clearly than any of the other categories the necessity for a pre-trial ruling and the obvious propriety of the pre-trial ruling.

I don't see how anything, certainly the proceedings of the Commission, the formal proceedings, the minutes of the proceedings of the Commission, the rules of conduct of the Commission and all of those things, can have any probative value as to whether this conspiracy existed.
29 Whatever the facts, it could not prove anything one way or the other. It just has no bearing on this

limited conspiracy. It is a very limited one according to their own allegations.

Now, it is not going to prove or tend to prove that this bargain was made that they allege in their complaint, that is, the proceedings before the Commission are not going to prove that or tend to prove it. It is not going to prove or tend to prove that these railroads participated and did acts in furtherance of the alleged conspiracy.

I cannot see how the Court is going to be in any better position to rule at any other stage than it is today on that question, and that is my point.

Mr. Hough: May I be excused?

The Court: Yes.

Mr. Hough: Before I go, I just want to make one statement. Assume they get all this in — and I am very much concerned about it representing Cross from a time and money standpoint, as is obvious — why don't we have to bring in all other ten Commissioners that acted there to see whether he attempted to influence them, whether the decision was correct, whether they were free from influence, and what not?

It goes out into ramifications that are indefinite. That is just what we will have to do.

The Court: Does anybody else for the Defendants desire to make a statement within the area Judge Thompson has covered?

(No response.)

The Court: Who is going to speak for the Plaintiff? Are you going to speak on behalf of the Plaintiff?

Mr. Thomas C. McConnell: Well, I will speak generally, with respect to the general area.

The Court: Yes. That is what I am talking about.

Mr. Thomas C. McConnell: Mr. Freeman is better qualified than I am to speak on these specific items of evidence.

Of course, the purpose of these motions, as Judge Thompson discussed, is to try to limit the evidence.
31 I concede that is the purpose. How far that should be done in a conspiracy case or whether it should be done at all in this particular case is really the issue before us, and when the question is posed to Plaintiff's counsel it brings up the question of the whole preparation for the trial of this case.

I do not think any lawyer is in a position this far in advance of the trial to tell exactly in what way and in what manner he is going to use individual items of evidence in proof of a conspiracy.

Now, Judge Thompson very characteristically oversimplifies all these problems. The question of proof of a conspiracy is not, as he stated, proving a conspiracy with a statement, or with one witness or one document or with any combination of witnesses or documents testifying to the direct question whether there is or is not a conspiracy in this case. I do not think I need to elaborate the contention before your Honor that conspiracies often are and many times can only be proven by inferences drawn from facts and evidence which is before the jury, and ordinarily, at least in every jury case I have
32 tried in this field, the question before the jury is, from all of the inferences which are drawn from all of the facts which are presented is there or is there not a conspiracy in this case?

I have never yet heard in my experience, and while it is not as vast as that of Judge Thompson, still it does carry some measure of experience in the field — I have never been limited in the manner which the Judge suggests here, that is, the Judge across the table.

The Court: Well —

Mr. Thomas C. McConnell: We — pardon me.

The Court: Just so we direct you along the line, in

going through this there could be a vast volume of discovery and the time and money of all the parties could be spent and then we would come to the trial and I might rule that it is not admissible.

I think we have an area there where there should be a limitation on the issues, particularly when I examine, which I have done — I have not gone into every area in all the files that there are on it to date here, but there certainly have been plenty of motions, and with
33 a conspiracy such as is charged here and with the proof that might or could be considered by you admissible, it does present a serious problem.

As an example, there have been raised the cases before the Interstate Commerce Commission. In your brief and statement you told me that all you wanted to do was to show that these matters had been pending before the Commission, but once that inference is in there then the Defendants have the burden of overcoming that inference and if they submit substantial proof within that area then on rebuttal you have the right to come back with further proof.

Now, that is what I am attempting to see within all of these areas, what can or might be done. I realize that a conspiracy is something in which you cannot say, "This was done and that was done", but here we are dealing with the scope of what could or might have to be prepared, and that is what discovery is for in connection with the trial, and the expenses that all of the parties may go to, including the Plaintiff, to prepare it and then at the trial I would say, "I am ruling that this is not
34 admissible", after you have spent thousands of dollars, say, in preparing for that.

I just pose that in connection with your statement that you did not know what area or how far or to what extent it might go.

From the discovery to date, which I assume from what I have read has covered approximately two years, don't you have in mind the areas that should be covered by this and how far it should go?

Mr. Thomas C. McConnell: Yes, I do. I have the areas in mind, but my difficulty is in believing that we are trying to get within the legitimate scope of conspiracy proof, or whether I am faced with a maneuver here to so limit my handling of this lawsuit that I cannot adequately present the Plaintiff's case. Now, that, it seems to me, is the question I have before me.

I want to state this before we discuss the minutea of the evidence: Judge Thompson made a statement here which — I don't know where he gets it, but certainly I want to refute it at the earliest possible moment. He said that we are all in agreement on this contract, that it is a perfectly lawful, legitimate contract.

35 We are not at all. I feel that the contract that was made here is one of the most flagrant violations of the anti-trust law that I have ever seen in any lawsuit. Certainly one of the major issues in this case is whether or not that, standing aside from everything else, whether that contract in and of itself is not a sufficient violation of the anti-trust laws to justify recovery by the Plaintiff here, leaving the only question in the case the question of damages.

Further, he is asking for evidence, prior to the admissibility of any other evidence of conspiracy, of whether there was any conspiracy, and I have never seen more cogent evidence of a conspiracy, leaving the contract aside as a contract. Forget it as a contract. What more conclusive evidence of a conspiracy, as a foundation at least for proof, could a litigant ever present than a contract which he concedes exists — there is no question about its existence — in which all the defending parties sat down

at one time, at one place, and affixed their signatures to what is not only a contract, but after all, the defini-
36 tion of the conspiracy law as I have always heard it would qualify it also as a conspiracy to suppress competition in this very important segment of Interstate Commerce.

With respect to that angle of the case we come into a violent conflict as to what we are going to prove and what the nature of this conspiracy is, at the very outset of the case. Now, that your Honor can pass on in advance as to whether or not that contract does violate the anti-trust laws and as to whether or not that is sufficient foundation for other conspiracy proof, which he says is all hearsay, not admissible in evidence at all because it is hearsay, but concedes in his brief all the way through each item, that it is competent, admissible evidence, once you show that there is a conspiracy.

Now, I do not agree with his statement of the law on that. There is no condition precedent. It is a matter of the sound judicial discretion of the Court as to the order of proof and whether or not, when all the inferences are drawn from all the evidence that has been presented, the jury is justified in concluding that a conspiracy exists.

37 If it does, then the Court usually instructs the jury — I am not setting myself up as to how the case should be tried, but I am just drawing on my own experience as to how they have been tried in the past. The Courts have waited until that point has been reached and then told the jury by instruction or withdrawing the evidence whether or not a prima facie case has been made out for the admissibility of evidence which otherwise would be hearsay.

Now, what Judge Thompson is saying is that we can divide this case up in little segments, we can cut it up in

little bits, we can take this part of the evidence and that part of the evidence and view it alone in advance of trial, and then he is going to argue why, of course, it doesn't mean anything, we get into this business before the Interstate Commerce Commission, and so forth, and we have to try all these lawsuits—we are not going to try all those lawsuits—but that is a different thing from saying you are going to limit all evidence and proof that might be admissible on that in advance of trial.

Now, as I see that issue all there is in it is this, that
38 Cross had tremendous influence with the railroads. He had to. Why? Because he was Chairman of the Interstate Commerce Commission dealing with matters in which they were present before him and—

The Court: Didn't he become Chairman—

Mr. Thompson: After this was all over.

The Court: (Continuing)—after the contract and all was entered into?

Mr. Thomas McConnell: Well—

The Court: He was not Chairman at the time, was he? Is that correct?

Mr. Freeman: He was Chairman commencing July 1st.

The Court: Yes.

Mr. Freeman: He was slated to be Chairman though.

Mr. Thomas McConnell: But he was on the Commission, at any rate.

The Court: Yes, but you said he was Chairman and I wondered if there was a disagreement on that.

Mr. Thompson: No.

Mr. Freeman: No.

Mr. Thomas McConnell: The point about Cross is a very simple one, that he was in a position to use his
39 influence with the railroads and that through the interposition of Keeshin he did use his influence with the railroads and this influence existed by virtue of his posi-

tion, not by virtue of how he decided a particular case which was pending before him, but he was in a position to use his influence on the Commission, and one man on that Commission can influence what is being done by others either in discussion, by advocacy, by talks informally or on the record, and it is perfectly obvious what the conflict was.

The Senate saw it and apparently Cross saw it because he was quite apologetic, as you see in his deposition and in the record.

Now, why we should have to go into the minutae of that evidence when your Honor controls that at the trial, I do not see. This is very interesting to me, because the last time I argued this issue—

The Court: What are you discussing, now? You have mentioned two things. You say, the minutae of that evidence. You mean before the Senate Committee, or his deposition?

Mr. Thomas McConnell: Well, I was addressing myself to Judge Thompson's contention here—

The Court: Yes.

Mr. Thomas McConnell: (Continuing) —that we had all these lawsuits to try—

The Court: I see.

Mr. Thomas McConnell: —before the Commission.

The Court: All right.

Mr. Thomas McConnell: I said at the beginning that we did not have any intention at all of trying all those lawsuits before the Commission. We say that in our briefs. What our position is here, rather than going through having this case departmentalized and cut up into little segments at this stage of the proceedings, it seems to me that in ruling on evidence the Court is in far better position to rule on it at the trial when he sees how the case develops, when he sees the background, when

he sees whether or not there is the foundation proof for conspiracy and whether or not things which we are offering from time to time tend to prove what we have alleged in our complaint.

41 Now, we not any more interested than Judge Thompson is in getting this case out into left field. We want to be perfectly logical, we want to be concise, we want to get the case presented in the shortest possible time, but under the guise of doing that I don't want to have little pieces and segments of my evidence which, from where I sit at the moment, may not be important or seem important but at the trial might assume tremendous importance, cut away from me.

With respect to discovery, we are all through with that? As I understand it, both of us are ready to go to trial. We haven't any problems with respect to discovery that I know of, your Honor.

The Court: Well, I was informed at one meeting here that it was not completed, that is, the Defendants'. I believe the statement was to the effect that it would depend upon what limitations were made at this time as to the nature and extent of the discovery that the Defendants had yet to take. Now, is my recollection correct?

Mr. Meserow: I made that statement.

The Court: Isn't that a correct statement?

Mr. Meserow: That is correct.

42 The Court: Somebody made it. I do not recall who it was.

Mr. Thompson: Well, the statement that was made, your Honor, is pretty much as you have stated it, that if these areas are opened up, which we think clearly are not areas that should be inquired into, and we are honest in our feeling about that, if they are opened up then, of course, we do have to take discovery to meet some of them.

That has to do with the Interstate Commerce Commission thing. It has to do with certain real estate transactions, and so forth.

The Court: We will let Mr. McConnell proceed, but I thought somebody had made that statement here.

Mr. Thompson: That is correct. It is all concluded, as Mr. McConnell says, except if these areas are opened up that we think we should not have gone into on discovery and haven't.

The Court: Go ahead, Mr. McConnell.

Mr. Thomas McConnell: Speaking for our side of the table, as far as our side of the table is concerned, as
43 I understand it, and I am satisfied in my own mind it is true, we haven't any discovery program ahead of us at the moment unless something develops that the other side should bring in here.

So far as our proofs and so far as what we are using as preparation for trial, we have practically completed it. I understand there are two or three depositions that might be taken, one of Cross's son and one of some machinery equipment company, and maybe one or two others, but it is nothing practically, in view of the time that is available for us prior to trial.

In so far as wasting money is concerned, whatever money we have wasted we have wasted already.

Now, to get back to the over-all, and I do not think this case can be dealt with except on the over-all and I do not want to be maneuvered into a position where we are dealing with it in little segments because the ordinary strategy of defendants in an anti-trust case is to take each little part of it and examine it and decide
44 there is nothing wrong with it and then throw it away, and when you get through with it all there's nothing there that's standing alone is illegal.

That is true of every conspiracy under the anti-trust

laws, because it is not the individual acts that are illegal; it is the over-all intendment and purpose of the conspiracy which makes it illegal, and no conspiracy of this kind can be carried out except by individual acts which standing alone are legal.

Now, it is the job of the trial advocate at the trial to put those things all together, and how they are used changes from day to day as you are dealing with the situation before the jury. We may compare it to a supply of facts and evidence which we have accumulated here on pre-trial and discovery procedures, which we have a right to do under the Act, and then to have any large segment of that just put aside where we can't use it under any circumstances at the trial, I say utterly precludes us in the proper presentation of the trial of our lawsuit and I think that is exactly what my opponents are trying to do.

I do not think we can lose sight of the over-all thing here. As Judge Thompson says, this is a very simple conspiracy and we intend to keep it that way. We have a conspiracy here which, as I say, is proven if by nothing else, by the contract which was entered into between Keeshin and the railroads and it grows out of this situation, if the Court please:

We had this business; the Parmelee Company had this business with the railroads for years and years and years, I think 103 years. They never had a contract. It was done on an at-will basis. Never at any time did those arrangements preclude any competitor from coming in and competing on the same basis that we were competing, and the fact that it didn't is shown by the fact that Keeshin did come in and compete and others came in and competed and we never tried at any time to tie any of that up into contracts or agreements or anything of the kind. It was done on an at-will basis, the terms

changing from time to time as conditions differed, but never at any time was there anything that tied that business up in the hands of Parmelee as against Parmelee's competitors. Then something changed. Then along
46 came Mr. Keeshin and through the entre which he had through Cross to the railroads he emerges with a bid for a five-year contract, which he insisted upon, as the evidence now shows, because he said he couldn't get together the trucks and the equipment which we had accumulated over a period of years unless he had this five-year contract, and to meet that five-year contract we bid on the subject matter which was offered to us by the railroads, and it has been our contention all the way through that that is an illegal arrangement, it was an illegal arrangement, that we had a right to go on with the normal expectancy which we had from our relationship with the railroads free from illegal intervention of this conspiracy and resulting illegal contract.

Now, it is just as simple as that, and what you might call around on the periphery of the case, the collateral issues more or less show the intendments which were utilized and used to bring about this meeting of the minds to take business from the normal expectancy of business which Parmelee had away from them and
47 give it to Keeshin and preclude us for a period of five years from ever getting back into the picture, where we lost our personnel, where we lost our equipment, where we lost all our chance of being in the business, and we were ended in it once and forever by that illegal contract. Now, it is just as simple as that.

Now, to sit down here in advance, and I am going to let Mr. Freeman deal with these specific questions of evidence, but to sit down here in advance and say that this evidence, looked at alone, out of context with everything else we are going to prove in this case, cannot be

admitted at the trial—I have never heard of a ruling like that in any case, and I do not believe counsel can point to a single ruling in an anti-trust case or any other case where whole segments of evidence have been excluded in advance of trial.

The Court: I might say in response to that, Mr. McConnell, that I am not going to rule on any specific item today. I am going to list to the whole context of it, and I want to have each item argued so I can
48 review it in connection with the pleadings. This is a part of it.

I have spent quite a bit of time on this; I spent quite a bit of time over the week-end, and when this first came up, and I am not aware of all the areas and certainly I do not expect to enter a ruling on each specific item today.

I intend to have you come back here, probably in June, when I have had an opportunity to examine it. I do not expect to preclude you or to say that you have to go out into other areas, because with what is involved in this case and with the issues and acquainting yourself with the pleadings, it is not something you do overnight.

You gentlemen have lived it with a period of over three years, and while I have lived with it for a few months I have also been living with a few other cases, so I wanted to get the outline in both of your minds within the general area, and then we come down to specifics and then I will attempt to reach a conclusion covering the general area and covering the specifics, at which time I will have all of you in here when that
49 is done, so we have a clear understanding of it.

I intend to have the transcript of the arguments written up and then go through and examine it all carefully, and I say that I am not going to—I feel that if there are areas within which we know how the trial is

going to proceed and the defendants know how the trial is going to proceed, those can be delineated, but I do not intend to break it up and try to rule on segments of it, to break it up. What I am going to look at is the general effect of what my ruling will be on the whole over-all of the case and if there are segments that enter into that, that I will determine are not a part of it, it will be on the basis of looking at the pleadings, the issues that are joined and what I feel should be in the scope of the trial.

Does that answer your question?

Mr. Thomas McConnell: Yes. It answers my question. There is only one other consideration I want to advance, and then I would like to have Mr. Freeman answer the specific area of evidence which the Judge discussed.

50 We have been in discussions among ourselves on how to raise the issue of legality of this five-year contract, whether—

The Court: You mean amongst the Plaintiffs?

Mr. Thomas McConnell: Amongst ourselves, yes.

The Court: Yes.

Mr. McConnell: We have lawyers in New York, a number of lawyers, and we have discussed it back and forth.

We had come to the conclusion that the way to raise it was probably by a motion for summary judgment on one aspect of the case. As far as I know it has never been up to be briefed in any form but it does appear in the reply brief which was filed by Judge Thompson, in which the statement is made in the brief, which is made here today, that this five-year contract is perfectly legal and that it's out of the lawsuit and we are all agreed on that.

Now, I would like to raise that question as a pure question of law. If it is decided that that contract is

illegal on its face, per se illegal, it may dispose of practically everything in this lawsuit except the question
51 of damages. If there ever was a situation where, to shorten up the trial, something should be brought up and disposed of in advance, that is it, because we are all agreed there is a contract. We are all agreed that the terms of the contract are thus-and-so.

There is not the slightest dispute in the world about what it is. The only dispute we have is whether or not it is legal or illegal. Judge Thompson says it is perfectly legal. I don't know where he gets it; there isn't a case in the books that holds that. Every bit of law is against him, and—

The Court: Well, apparently there is a difference of opinion on that.

Mr. Thomas McConnell: (Continuing) —and we say it is absolutely illegal.

The Court: The way that could be raised would be on a motion for summary judgment with supporting affidavits, to which they have the right to reply. I do not have that matter before me for determination at this time, but certainly you have the right to bring that up and to explore into that. Very frankly, I have not explored or examined or considered it.

52 If there is such a difference of opinion then certainly the rules provide a way that you can present it and it can be considered. It is an issue and you have the right to bring it up, but we are within the scope of Judge Miner's order here on the admission of these documents and the areas that should be considered on that.

I don't think, at least not from my examination of it—maybe I did not see it—that the question of the contract is before us here today.

Mr. Thomas McConnell: Only except in so far as it has come up in his brief.

The Court: Oh. You mean the points that are raised in connection with the evidence?

Mr. Thomas McConnell: He has raised it in his reply brief.

The Court: I understand.

Mr. Thomas McConnell: I am simply stating my position that I do want to have it raised and determined, and of course, we know that we can raise it and will raise it in due course.

The Court: Yes.

53 Mr. Thomas McConnell: But as long as it has been put in his brief and raised I want it perfectly clear on our pre-trial conference what our position is.

The Court: That you do not consider it a legal contract.

Mr. Thomas McConnell: I certainly do not.

Mr. Thompson: Well, if the Court please—if Mr. McConnell is through.

The Court: Have you anything else?

Mr. Thomas McConnell: There is nothing more I want to say.

The Court: Do you have anything to say?

Mr. Freeman: Yes.

Mr. Thompson: May I interpose one thing there, just on this general thing? May I just have a word?

Mr. Freeman: You mean just on the legality of the contract?

Mr. Thompson: Yes.

Mr. Freeman: Surely. Go ahead.

Mr. Thompson: I made no statement, and if there was anything I said which gave Mr. McConnell that impression or the Court that impression, I do want to

54 say that I made no statement that we all agreed that this was a legal contract. What I said in my brief and what I say orally is that the issue presented in this

case, on this proceeding, is confined by the pleadings. They say that the violation of law, that is, the issue Plaintiff complain of, is the agreement among the Defendants to eliminate competition for the railroad transfer business and to confer a protective monopoly of that market on Keeshin.

Now, in the course of my discussion on that I said that when Judge Sullivan ruled on our motion to dismiss the complaint he said, following two Supreme Court decisions which he cited, that the fact that the contract was one giving Keeshin an exclusive transfer service was not illegal and he also ruled, following two Supreme Court decisions, that the fact the railroads acted together in drafting the contract did not make it unlawful.

Now, those two questions were presented and decided already. Of course, counsel can open it up again by any motion he pleases, but it is not before you. All I want to say is that I did not say and do not mean to
55 indicate that counsel for the Plaintiff are in agreement with my position that the contract is a legal contract. I am influenced simply by two decisions of the Supreme Court of the United States and by several decisions of other Federal Courts and Federal Agencies and have seen nothing to the contrary.

Mr. Thomas McConnell: Neither of which decisions are in point in this case.

Mr. Thompson: Well—

The Court: As I say, gentlemen, that is not one of the phases we are discussing here. If it is brought in, I will go into that. If that point is to be raised then certainly my decision on what we have before us might be postponed at this time, if you are coming in on a motion for summary judgment with affidavits, until I passed on any motion for summary judgment.

If you are considering doing that—I am not asking you

to say now—but after our lunch hour I would want you to indicate if that were going to be done before we conclude today, because that is an element that would then affect the over-all of this.

56 Mr. Thomas McConnell: We have decided we are going to do that.

The Court: You have decided you are going to present such a motion?

Mr. Thomas McConnell: Yes. We will present it at the earliest time we can.

The Court: Well, we are in the midst of all of this. I am going to get all of the facts on every specific here today within this area so we do not have to go over this ground again, and if you do present a motion for summary judgment then we can see what that presents and what it will involve and how much time there would be in connection with it.

Now, do you have anything to say on the general aspects of it, Mr. Freeman?

Mr. Freeman: Yes, Judge Robson. I do not want to acquiesce nor do I want to get into a controversy with Judge Thompson with respect to what was presented to Judge Sullivan in connection with this contract. Let me just say that in my opinion the legality of the contract was not fully briefed, so let's leave that out.

The Court: I think the record will speak for
57 itself. You have the right to present a motion within that area.

Mr. Freeman: Let me try to discuss with you for a moment a matter that seems to be troubling you, and that is the question of the Interstate Commerce Commission problem and the extent to which it broadens or limits the scope of trial and of the discovery areas.

I might introduce the subject by pointing out that in our complaint we do allege in paragraph 26 that the

Interstate Commerce Commission was created and matters of great importance were pending before them, to be decided by the Commission, and the Defendant railroads had matters of great importance pending before the Commission. This allegation is admitted by all Defendants.

In addition, in Paragraph 28, and this is very significant, we allege that:

"Under the declared policy of Congress and usages and regulations developed by the Commission, members of the Commission are under a duty to avoid private dealings with railroads which would impair
58 their ability to deal impartially with persons subject to the jurisdiction of said Commission."

This allegation likewise is admitted by all of the Defendants. Before I turn to this Baltimore & Ohio finance matter which seems to be—

The Court: Well, let me suggest this, Mr. Freeman: We are going to discuss that under a specific area. Judge Thompson raised it in answer to a specific question that I had asked.

I do not want to preclude you unless you want to make some general statement, but we will come down to the specifics of that, and won't it be more or less of a repitition of what you would have to say now within that area, in that we are coming to the specifics, and I want to hear a statement from each side and their ideas in connection with it? I do not want to preclude you, however.

Mr. Freeman: Well, let me then—

Mr. Thompson: Well, I am ready to hear him now on the specific on the Interstate Commerce Commission question. I think I have opened it up sufficiently.

Mr. Freeman: You have said all you wanted to,
59 Judge?

Mr. Thompson: At the moment.

The Court: All right.

Mr. Freeman: Before considering that issue, and without repeating the remarks that we made in our opening memorandum with respect to those facts that are established through the discovery process, and remember, we are not dealing here with evidence already presented at the trial, but we are dealing with matters that have been developed in discovery, I would like first to just briefly outline some facts that have, in our opinion, been misstated in their reply brief and in order for you to judge the specifics of each area of proof you should be advised, and I would like to emphasize them.

The negotiations with the railroads that preceded Cross's entry into the picture had gotten to the point where several prominent railroad officials and all of the railroads unanimously had come to the conclusion that their negotiations with Keeshin and with Willett and others were leading them nowhere and they should continue with Parmelee, and they would not change from Parmelee unless they received a substantial reduction in the coupon rate that was involved.

The reduction that was spoken of in the railroad memorandum is from $1.20, which was then being charged, to $1.00 or $1.10 as a reduction.

Now, I might pause and out of chronological content point out that the contract that was awarded to Keeshin was at a starting rate of $1.20 and at maximum prices for the five year period higher, higher rates than had been proposed in writing for a six year period by Parmelee, so that the whole genesis of the negotiations are negatived by what they actually did for Keeshin, because the record is unanimous that all of the railroads said, "We are in these negotiations for the sole purpose of reducing costs if we can. We are thoroughly satisfied with Parmelee's service", and they say so in writing and repeatedly.

Now, the claim is made in the brief, and I am going to try not to argue the facts as such, but just a few points, that this particular decision was reached by subordinates of the railroads and it was not until it came to the officials that the actual selection was made. At another
61 point it is pointed out that the top officials of the railroads did not participate, when they seek to save the presidents' skins, but the decisions that were made in March and April to continue with Parmelee, and prior to Cross's intervention, were made by the Vice-President of the New York Central Railroad on March 24th, who said in a letter to us:

"Your proposal is eminently reasonable and I see no reason why it should not be accepted."

This is the Vice-President of the New York Central. It was said by the Vice-President of the Baltimore & Ohio Railroad in a memorandum that he wrote to the President on April 11th, in which he spoke favorably about our proposal and indicated what was to be done and never even mentioned Keeshin as a competitor, even though Keeshin's full proposal had been before him and fully discussed.

It was accepted by the General Passenger Traffic Manager of the Santa Fe and of the Illinois Central. Now, these are the top Passenger Traffic people. A dis-
tinction must be drawn between a passenger agent,
62 who is merely a local fellow, and a General Passenger Traffic Manager, who is over all the railroad as far as passenger traffic is concerned.

This statement that the decision to continue with Parmelee was only by some subordinate passenger official is not so. As a matter of fact, as the story progresses we find that the Vice-President of the North Western Railroad has a memorandum saying, "Continue with Parmelee", and that memorandum is dated May 27th. We

have others of that character. So much for that.

The story as told by Keeshin and Cross, and concededly by them, is that Keeshin on March 29th, 1955, went to Washington and met with Cross; that he asked Cross to put in a good word for him with the railroads with whom he was negotiating; that Cross knew he was negotiating with six railroads; that Cross from time to time, and Cross so testified, from time to time reported to Keeshin of his contacts with Simpson, the President of the B. & O., Feucht, the President of the North Western, and possibly Johnston, the President of the Illinois Central.

63 Cross further testified that Keeshin—or rather, Keeshin testified that he called Cross after he was awarded the contract and thanked him for the help he had given him, if any. Cross had 34 telephone conversations, long distance, with Keeshin. He had many with railroad people. His activities are fantastic.

The Court: Well, now—

Mr. Meserow: We are getting away from the issue here a little bit, your Honor.

Mr. Freeman: Well, let me—

The Court: We do not need a lot of detail.

Mr. Freeman: All right.

The Court: Here is the point, as I understand it, that was brought up: That is as to whether or not you should be permitted to go into all of the cases. Now, that was the premise on which it came up. Now we are going into the telephone calls, which are another issue, and all that.

Mr. Freeman: I did not mean to do that.

The Court: I think, Mr. Freeman, the area that I see, and Mr. Thompson said it was agreeable to go ahead, are certainly we are covering many of the factors

64 that we have involved here, but the thing I am trying to get through my mind and that I think we ought

to address ourselves to specifically more or less as outlined, because the extent to which you are going here now shows that we are going to cover the whole thing rather than coming down to this one as to what is the factor of the various cases that were then pending before the Commission.

Mr. Freeman: I really meant this only as a predicate to this, and let me just make two more sentences, and that will complete my preliminary statement.

The Court: I do not want to preclude you, Mr. Freeman.

Mr. Freeman: I appreciate that, and I appreciate the direction, your Honor. The point of this matter is that Cross did visit Baltimore and the President of the B. & O. He visited Philadelphia and the Vice-President of the Pennsylvania. He did visit various people in Chicago. He made telephone calls to these various railroad people.

All these telephone calls and all of these visits were charged to his own personal expense. When he made
65 a call at the Interstate Commerce Commission he would charge it to his own phone. These, it seems to me, establish the fact that these visits and these calls were not on official business.

To get to the Baltimore & Ohio in the Interstate Commerce Commission matter: Cross did testify that he visited Simpson in Baltimore at his office and he spoke to him about the Baltimore & Ohio financing matter which was the most important thing then pending as far as railroad financing was concerned. It was a pending matter.

In the finance matters before the Interstate Commerce Commission three Commissioners form a Division, and—

The Court: It is conceded by both sides that that was an ex parte hearing and not an adversary hearing.

Mr. Freeman: It was —

The Court: Is that conceded by you?

Mr. Freeman: No. The proceeding is ex parte to this point, that the Baltimore & Ohio filed an application, but under the statutes that are controlling notice is provided to the States, notice must be provided to those
66 security holders that are affected by the changes, the matters involved qu stions of great moment with respect to the interest rates, the proportions of securities and the timing of the issue, and Simpson acknowledged that that becomes very important, getting the decision done today rather than two weeks from today because there are underwriting and other problems, and the problems are controversial in that they are of tremendous significance and involved a great deal of hearings and discussion.

The point of it is, and the only thing we bring in as far as this case is concerned is that Cross concededly went to Baltimore and talked about the B. & O. financing in the President's office and at that time inquired about the transfer matter, and it is also conceded by both Simpson and Cross that every time Cross called him, and there are six or seven such calls, Cross talked about the transfer, and when we asked Mr. Simpson whether Cross was requesting information he said, "Not requesting; he told me."

Then when we asked Mr. Simpson how many times
67 he had called Cross, because Cross had said Simpson had called him two or three times, he said, "I only called him once to give him the status of the transfer thing", and when we asked him again he said, "You have a helluva memory", which was his own language, but immediately thereafter we found a notation that he had called Cross and inquired about the financing problem. He had called Cross privately at his home in Charle-

voix, and the next day Cross appeared in Washington to hold a meeting with the B. & O.

We are not interested in whether the B. & O. financing was good or bad, whether that decision was a good one or a bad one. I think it is almost possible to concede that the decision was a valued one and a correct one, but the important thing is that there were many, many facets of that decision that were problematical, that were difficult as far as the railroad was concerned.

For instance, one of the things that was very important there was, would the Baltimore & Ohio be exempt from competitive bidding, and they were ultimately ex-
68 empted. There are a whole series of decisions that come out of the Commission. This is not a ministerial, administrative thing. This is a series of problems that had to be resolved, and to simplify it by calling it ex parte is quite aside from the point.

What we would present in this record is that Cross had these conversations that I mentioned to you, which are conceded by both Cross and Simpson; that they occurred contemporaneously with Cross's requests for information or with having told Simpson about the transfer matter, and that the B. & O. hearing itself on the basis of the official reports of the Commission was a very important matter.

Actually, we do not need the official reports of the B. & O. because the record itself, both Simpson's testimony and Cross's testimony, state that the B. & O. financing was a very important matter to the B. & O.

Now, this, we think, is very, very significant, there can be no ducking it, and to claim that they will be put to a tremendous amount of expense in discovering what the B. & O. financing is to me does not seem realistic nor honest.

69 The Court: Now, let's explore that for a moment.

Mr. Freeman: Yes.

The Court: Statements are easy to make, but if you put that in, all of this discussion, then of necessity doesn't the defense have to bring in all the facts? I am looking at it from the trial viewpoint. If we go into all of these —I am not saying you haven't the right to, but once you go into that factor, together with all of the other dealings that were had, that is in the minds of the jury. It is not like trying it before me; I can supposedly only consider that which is properly admissible, but once that factor comes before the jury, if the defense is properly going to meet that, don't they have to go into the details of what was involved?

That is, I assume that they would want the right and I would have to then rule on their right to introduce in the record all of the proceedings, to call in all those who were acquainted with it and the factors concerned with the case that was then before them, the same as it would be on all of the other matters that were pending
70 before them.

You having been allowed to go into that, then I have to rule on that within their area, isn't that correct?

Mr. Freeman: That difficulty which you pose as an academic question, does not hide the fact—

The Court: I did not pose it as an academic question. I am posing it as a practical question.

Mr. Freeman: As a practical question, yes. That does not hide the fact that the conversation did occur, that it serves to explain the motivation of the B. & O. in doing this. Now, let me just point this out to you, which does not appear, and which we haven't developed: the Baltimore & Ohio President was contacted by Cross, and I will try to give it to you simply and accurately.

The General Passenger Traffic Manager says he was called into the President's office and said, "Jack, what

is the status of this?" The next step we find is that the Baltimore & Ohio's Passenger Traffic Manager goes up to New York, and we have a memorandum of April 21st in which he reports a conversation he had with his
71 counterpart in New York in which he advocates, on April 21st, that they change away from Parmelee to some other carrier.

The Baltimore & Ohio — this man, this same man who has contacted the President, now, becomes the leading spokesman at two meetings of the Committee. He had never previously come to Chicago, or not in ten years, because he was in Chicago ten years prior, but he had not previously come to Chicago to attend any of these meetings. He suddenly shows up to attend these meetings. He has no discussion, and this is all in the record — he has no discussion with the local passenger agents who have been attending all these meetings and who are thoroughly informed.

He comes in in the morning, he attends the meeting, he leads the discussion in both the May 19th meeting, which is the significant meeting, and in the June 3rd meeting, and in fact he makes the motion for Keeshin in the June 3rd meeting.

Right after the May 19th meeting he prepares a memorandum in which there is a suggestion as to how
72 Keeshin should revise his bid to make it more attractive. In another memorandum that he prepares when they are concerned about how the fourth and fifth year rates should be, what maximum they should have, he suggests a maximum rate which is four or five cents higher than anything we had proposed.

This is the scope. This is what we think, and what we believe a jury would certainly find, that there was this contact made by Cross; that it is conceded in all of these contracts Cross discussed with Simpson, the President of this railroad, the Chicago transfer negotiations.

At the same time, contemporaneously with it, he discussed the Baltimore & Ohio financing problems. This is what he did, and if that leads to a burden of attempting to disprove that that may have motivated the Baltimore & Ohio, we find that their activities from then on are so drastic, and the Baltimore & Ohio is only a very small element in this transfer, they represented only 4.3 per cent—

The Court: Now, you lead right to the question that I put.

Mr. Freeman: Yes.

73 The Court: Once that is permitted to go in, then you have all of the other elements of all of these numerous cases that might or could—I do not know what you have gone into on your discovery, because I do not have that before me, but you may have the question with 21 railroads—

Mr. Freeman: Oh.

The Court: (Continuing) —and a series of 30, 40 or 50 different matters that were pending before the Commission wherein or whereby they might be influenced.

Mr. Freeman: All right. I see.

The Court: Now, that is what I am thinking about, is this whole area.

Mr. Freeman: All right.

The Court: Once we open it up, the thing I think we have to attempt to look at is this: Is it germane to the issues? Once we start going into that—

Mr. Freeman: We do not propose—

The Court: (Continuing) —what will the limits be and how far are we going to go? Your brief is not completely clear on it, because you say that there are just certain cases—I was trying to find it here in

74 your brief, but I cannot locate it immediately. As I recall it, what you said you wanted to go into are just certain cases.

Mr. Freeman: Six cases, yes.

The Court: You mentioned six cases.

Mr. Freeman: Yes.

The Court: But you do not limit it to six cases—

Mr. Freeman: Well—

The Court: (Continuing) —as far as what I have involved is concerned.

Mr. Freeman: Well, let me say this: The fact is conceded that there were many cases of great importance pending. We don't have to submit a list of cases and we don't propose to.

The Court: I am not saying that you have to submit a list, no.

Mr. Freeman: We do not want to.

The Court: I am exploring the general issue we have involved here.

Mr. Freeman: Our aim would be to limit our presentation of matters involving the Interstate Commerce Commission to those matters where Cross did have private conversations with Defendants and their agents or
75 where there was a direct relationship, which we can establish, between Cross, the transfer negotiations and the particular case pending.

The Court: All right. Let me ask you this question, Mr. Freeman: Would you, for the purpose of the record, be willing to stipulate that just six cases is all that would be involved and to the extent you put it in your brief?

Mr. Freeman: Six cases is all we would specifically refer to.

The Court: And it would just be the element of referring to the fact that they were then pending, because it is not specified as to whether there would be that.

Mr. Freeman: Yes. I believe—

The Court: You see, what I am getting at is here,

on all of these you have the question of limitation of proof, and it is my understanding of the pre-trial procedure that after we once reach an accord on it I can either dictate the order or a stipulation can be prepared which is agreed to between the parties, so I come to that point, which is a part of this:

76 Is that what you would agree to, and all that would be referred to is that they were then pending before the Commission, these six cases?

Mr. Freeman: And their scope, whether it be revealed by the official report, or whatever it is, so whoever had to consider it would understand what its scope was.

I think we could stipulate to what you have suggested. I would prefer that you let us come up with such an agreement at two o'clock, and I am sure there would be no difficulty. Just to restate what you have said so that I understand it, we would agree that we would only specifically refer to six Interstate Commerce Commission cases by name, that is, six cases, the B. & O. finance matter and the others—

The Court: Providing they were properly admissible.

Mr. Freeman: That is providing they were properly admissible—and we would, in connection with those cases, merely indicate, and not extensively, their magnitude and their scope or their significance to the railroads that were involved.

77 We would not refer by name to any cases beyond those six but, of course, we would reserve the right to make the statement, in the form of the allegation in the complaint, that there were many cases of great importance pending before the Commission.

The Court: Well, when you say "many", that is—

Mr. Freeman: Well, I believe—

The Court: (Continuing) —leaving it open.

Mr. Freeman: There are matters of great importance. I should not have said "many." I should have said, there were matters of great importance pending before the Commission, as indeed there are always are. The jury should understand what the Interstate Commerce Commission means. Now—

The Court: I am not saying that they shouldn't.

Mr. Freeman: No.

The Court: What I meant was, if there are many then the floodgates are open. If there are six, then at least it is tied down within that area. Now, I do not know what the Defendants would have to say within that area, but as I say, I am not going to consider it on the basis of each one of these items. I am going to consider this all on the basis of the over-all trial, so
78 that you have a right to present your issues and they have the right to present theirs, but certainly we have to have rules of the game and limitations, otherwise I can see where this could go beyond all bounds.

Every advocate has the right to place his interpretation upon the work within what he feels is a fair scope, and as I look at the pre-trial procedure here, the purpose is to say, "Now, here is the path we are going to follow" and this will be either what we agree to or what I rule will be agreed to. If you can have agreement on these issues then, of course, that is a satisfactory way to proceed, but certainly within many areas here I can see where there would not be agreement, and justifiably so.

Let me make this suggestion: We have rambled a little here this morning. This afternoon I would like to get down to the specific items that are raised and we will deal with them one at a time. I want to have it from this viewpoint: In other words, we are looking at it from the over-all scope of how this is going to affect the entire matter.

In other words, with respect to your suggestion
79 here as to just six cases, and only to mention them, whether the Defendants would agree to that or not, I don't know.

Mr. Thompson: The answer is "No."

The Court: Well, looking at it from the plan of the trial of the case, I agree with the Plaintiffs within this area, that I do not intend to just consider things by segments. I am going to consider it on the over-all effect of the case and that is the reason, as I say, that I address myself to the fact that I was going to consider it all from that viewpoint after more study.

If we can bring it down to what we have within the memorandums here, and any explanation, it would be helpful to me as to what your ideas are on the areas of this, and what it is going to effect in the way of detriment if it does not pertain to the issues of the case or if we are bringing in fragments that would divert the attention of the jury and they might be prejudicial and they do not deal with the issues.

Now, are there any questions you want to ask before you go to lunch so you can have the opportunity of lining it up so we can go through this afternoon?
80 We will go through until about four-thirty or quarter to five if necessary

Mr. Thompson: I think we can finish before that, because we have covered the general area already.

The Court: I think we have covered the general area, yes.

Mr. Thompson: All I want to say about this Interstate Commerce Commission thing, and it will not take a moment to wind that up, is this:

Number one, we do not agree in any degree with the statements as to the conversations and what-have-you that occurred between Mr. Simpson and Mr. Cross.

There was no discussion, as we have pointed out in our brief, of either subject between Simpson and Cross. It is a mere mention of a mere inquiry of Cross as to how Simpson was getting along with his refinancing and a mere inquiry of Cross from Simpson as to how the negotiations were coming on in Chicago. There was no discussion of that whatever.

Now, on this matter of limiting it to six, they would be picking out the six proceedings before the Interstate Commerce Commission which suited their purposes,
81 whatever they may be. We would have to review all six of them and prove that there was nothing wrong in all six of those proceedings, and I don't yet know what any of them are except the one he has mentioned about this refinancing.

There would also be the matter of our bringing proof, if we have to clean up Mr. Cross after they have smeared him by piling on the dirt, we would have to bring on all sorts of proof to show what a fine and honorable and outstanding Commissioner he was, and thereby bring in a lot more cases, perhaps.

The thing is utterly endless. There is no limitation, as we see it, that could possibly be put on it, and it seems to us that there isn't the slightest probative value to any of this Interstate Commerce Commission thing.

Among other things—we have outlined it in our brief in detail, and your Honor does not need the details here—the Interstate Commerce Commission thing involves a very wide area of inquiry as to the proceedings of the Commission, the organizational set-up of the Com-
82 mission, the rules governing the Commission and the Divisions and all sorts of things in these documents, and of course it is our position, and we have stated it, and I do not know how I can state it by emphasis by repetition, that if it is ever opened up it will

divert the attention of the jury beyond a point of recovery.

I just do not know how it would be possible to get the picture of the Interstate Commerce Commission before the jury. I don't have any conception of it, myself. My contacts are extremely limited, but as a man who ought to know something about what goes on in this world I have no conception of the breadth and scope of the Interstate Commerce Commission, and of course, there is every day, not at any particular time but every day there is pending before the Interstate Commerce Commission matters which may be vital to the economic life of some or all of the railroads of the country. There is a continuing situation of that character.

Now, we have to prove that to the jury. We have to prove that the Commission has always been honest in its decisions and it has always been correct in its decisions — an impossibility, of course — and we
83 would have to prove that all the Commissioners were asleep and Cross was running the Commission.

It is just unfathomable, where we would be going, if we ever got into this Interstate Commerce Commission thing. I do not see how there is any argument on the other side of it myself. I must confess that I must be blind.

The Court: All right, gentlemen. I will see you at two o'clock. Thank you for coming in.

(Whereupon the pre-trial conference in the above-entitled cause was recessed until 2:00 o'clock p.m. of the same day.)

84

* * (Caption—No. 56 C 323) * *

Monday, May 11th, 1959,
2:00 o'clock p.m.

Parties met pursuant to recess.

Present:

Mr. Lee A. Freeman,
Mr. Thomas C. McConnell,
Mr. Francis J. McConnell,
Mr. John Paul Stevens, and
Mr. Herbert B. Lazarus,
appeared on behalf of the Plaintiff;

Mr. Floyd E. Thompson, and
Mr. Philip W. Tone,
appeared for defendant railroads and railroad presidents;

Mr. Albert J. Meserow,
appeared for defendants John L. Keeshin and Railroad Transfer Service, Inc.;

Mr. Louis A. Witry,
appeared for Defendant Hugh W. Cross.

85 (And thereupon the following proceedings were had herein, in chambers, to-wit:)

The Court: The next question we have on the list here is the evidence concerning the investigation of the permanent Sub-Committee of the Senate.

Mr. Thompson: Well, that question, I think, has been rather fully presented in the briefs.

The Court: That is right.

Mr. Thompson: There is one of the documents which I cannot conceive any lawyer would argue could be admitted, and that is the report of the Senate Committee,

so I will not spend any time on it unless there is some defense of even listing that as a document which could be offered.

Obviously, it is hearsay as to everybody and it did not occur until 1956, which is long after the alleged conspiracy was over with. It could not by any stretch of the imagination be anything that occurred during the course of the conspiracy or in furtherance of it. Therefore, I will pass that.

The Court: Is there any question on that in your mind as to the report?

86 Mr. Thomas McConnell: Yes. There certainly is. It is a public record.

The Court: Well, then —

Mr. Thomas McConnell: Just because Judge Thompson thinks it is very plain, we do not agree with him.

The Court: That is the reason I asked.

Mr. Thompson: Well, that is all I have to say about it. It seems to obvious that I do not care to spend time discussing the obvious.

The Court: Well, the other area you have there is the question —

Mr. Thompson: There is much that I could say, but I think it has already been covered, and it does not seem necessary.

The Court: Well, you can present your points on it and then we will hear what Mr. McConnell and Mr. Freeman have to say in their area.

Mr. Thompson: Well, now, of course we have made our statement in our briefs as to the use which may be made of the examinations of these various witnesses. Of course, it can be used only for two purposes, one for proving admissions against interest that were made by any one of these persons and that, of course, would

87 be binding only on the individual, and that would

not be admissible when others are on trial if its reception would be unduly prejudicial to them, because it certainly is hearsay as to them.

Now, the other aspect of it is that if any one witness testifies differently than he testified at that proceeding, obviously you can use it for purposes of impeachment, but that would impeach only the one whose testimony was under consideration and it would not be affirmative proof of any fact.

Now, what we think is the even more serious aspect of that segment of our motion is the mere fact that Cross was investigated by a Senate Committee, something over which none of the other Defendants had any control, and could not have had any control over. They were no party to it. Some of them were called as witnesses by the Senate.

The investigation, of course, is one that follows no rules or rhyme or reason. The Senators, when they ask a question, don't ask a question; they make a speech.

One is not allowed to challenge their method of ex-
88 amination and counsel is not entitled to participate.

There was no hearing or trial in the sense that you could offer any rebutting evidence.

Nobody was being investigated except Cross. The investigation was solely for the purpose of ascertaining whether or not he had been guilty of conduct which was contrary to the public interest, and the only basis on which such an investigation is allowed to be made is for the purpose of legislation, so it was not a trial in any sense of the word and no other party was being investigated.

It was said that Keeshin and Cross were being investigated by the Senate. That, of course, is not true. It seems to us that to even disclose to the jury that there was a Senate investigation of the official conduct of Hugh

Cross is highly prejudicial and something that the other Defendants could not possibly meet. There would be no way they could meet it by any evidence, something to which they were not parties, which they could not control, all of which occurred months after the alleged conspiracy was consummated. In no sense was it any-
89 thing that occurred in furtherance of the conspiracy.

Furthermore, whatever was said there was a narration of past events which, of course, cannot be used in a conspiracy trial at any time, so we think that the legitimate use which may be made of the transcript of the testimony can be allowed without in any wise prejudicing the other Defendants.

The questions that were asked, if they are legitimate questions, and mighty few of them will be, can be read and the answers can be read without indicating who asked the question, and if there is any denial of the answer, of course, it can be proven that that answer was made on an occasion on a certain date in Washington, D. C. Where it was made and under what circumstances it was made cannot have any effect on—

The Court: Let me bring that up. That is one area I do not think was explored to any extent in either brief that came to my mind.

If there is a denial, assuming that all the points you have made are correct, how and in what way would you be able to avoid disclosing that this was taken at a Senate Hearing?

90 Say that Cross on the stand denied he was asked that question and made that statement. This is not a deposition that is on file here that you could take under the Rules of Court. Then you would either have to agree, that is, as between you, that this was the transcript of the record, and if you were not able to agree then the only alternative I can see would be that you would have

to bring in the Reporter who took the testimony from Washington, put him on the stand, and then you are on the horns of a dilemma in connection with the contention that the name of the United States Senate cannot be used.

Mr. Thompson: There is no problem at all. You could call the Reporter and say, "Did you take a statement under oath of Mr. Cross on November 15th, 1955?"

The Court: At Washington, D. C.?

Mr. Thompson: It does not make any difference whether it was in California or where it was, really. Then you would have to ask him, "Was this question asked and did he make this answer?"

His answer would be, of course, that he did. In
91 the first place, there isn't going to be any such question arise because up to now we have never raised any question that the transcript correctly reports what was asked and answered, so the question would not arise; but if it did arise, it is a simple and easy matter to make proof without all the rest of this prejudicial and damaging thing.

The Court: Well, I have not read all of your cases — in fact, I have not read any of the cases except as they are shown in the brief. There is no authority that is clear on this area as to whether or not the name of the Senate Committee would be prejudicial.

I can see your contention that it would be prejudicial, but as far as any authority on it, none of the cases in reading through the briefs here are in point as to the use of the name of the body before which it was taken. For example, if it involved a Municipal Court trial, certainly you would be allowed to use that. You could say, "Did you give this testimony?" and that is the usual and customary way in which it is done.

If it involved a Court of record or if it came up

92 here in connection with a proceeding before the Court of Claims, that is one thing, but this in the area of an exception and I can see the background of your argument with respect to it. Is there anything clearly in point where there was a similar body or a similar investigation?

Mr. Thompson: No cases has been cited. They cited two cases, one of them where it was developed, in that Tile case, I think it was, in New York, where the Legislature had made an investigation of whether or not there was some violation there, whether there was a scheme to fix prices.

Well, of course, all of the Defendants who were on trial were also the subject of that Legislative investigation, and the subject was not allowed to be received, or at least it was not received, in the case in chief. On cross examination of a witness, the Secretary, I think, of the Trade Association, it was developed that they had not carried out the part of their scheme which provided that all second grade stuff should be sold in the foreign market, part of the scheme of keeping the price up in this country, and the question of the fact of the Legis-

93 lative investigation was brought out on redirect examination by the prosecution from this witness, so it is quite a different situation, and there all of the Defendants were the subject of the Legislative investigation and here none of these Defendants, except Cross, were the subject of the Senate investigation.

Another one that they cited was a case which involved the Teapot Dome thing, and I think it was Doheny had testified at some Senate Hearing and it was held that the statement made by him as the President of the corporation was binding on the corporation; in other words, he was its agent and the statement was made. Whether it was good law or not is a question, but it has nothing to do with this.

The question was not raised in that case that is was a disclosure of the fact that this statement was made in some Senate Hearing that was objectionable. In the other case the question was raised in the Supreme Court.

Now, we have no case that is precisely in point. We do discuss some cases in connection with our position
94 here. Of course, it seems to me that the strongest argument against receiving it is the rule laid down in McCormick and many other cases, which is that where disclosure of a fact which does not advance the cause within the limits of the issues made by the pleadings will be highly prejudicial, in other words, where the price of receiving it is far beyond the value of the testimony, then it shall not be received.

Here, it seems to me, there is a clear line of cleavage, where they can use the testimony or the evidence, the transcript, in all respects in which they are entitled to use it and yet not disclose the fact that this was a Senate investigation.

The very fact that the Senate was investigating any public official, of course, would be highly prejudicial. He cannot object that it is prejudicial because he was the subject of it. Cross, of course, is prejudiced by it, but he was the subject of the prejudice and therefore he could not object, perhaps, but what about all these other Defendants who had nothing whatever to do with it?

The very fact that one of their alleged co-conspirators
95 was the subject of a Senate investigation is something we could not possibly meet. There just would be no way for these other Defendants to clear themselves of the smear that would come by virtue of introducing that fact before them, and it seems to me obvious that it would be prejudicial.

The prejudice, I think, is obvious and therefore the question is whether or not the necessities of the case

require the bringing in of the prejudice. The rule is in many cases, many of them — it seems to be a universal rule — that evidence, though it is relevant, will not always be admitted, and at least it will be admitted under the kind of protection that is necessary to avoid the prejudice that may be an essential part of it.

Now, in what possible respect could the fact that there was a Senate investigation prove there was a conspiracy, or in what possible way could the fact that there was a Senate investigation of Cross prove that any of these Defendants, even Cross, participated in the conspiracy?

Certainly, you cannot read that testimony except in so
96 far as it is an admission of Cross; you cannot read that testimony to bind anybody else.

There is no case that I know of that would justify just reading or putting in evidence a transcript of some other hearing. All you can ever use it for is the limited purpose of proving an admission or the limited purpose of using it for impeachment, and of course, we know the limitation of admissions. The limitation of admissions is that they bind only the fellow who made the admissions, and the impeachment simply challenges his credibility and leaves the jury to weigh his testimony, but it does not prove that what he said on the first occasion was the fact and what he says now on the trial is not the fact. It is a mere matter of the question of credibility.

Here is a situation that it seems so easy to protect against the evils and yet give the Plaintiff all the advantages it needs, and there is no challenge about that. So far as I am presently advised, certainly on none of the depositions have we ever challenged the accuracy of the report of the proceeding, and no witness has ever challenged it. The witness has always said, "Well, if that's the record, yes, I made that answer." In fact,
97 I think that they seldom ever qualified it to that extent.

I do not see how that would be limiting the Plaintiff in any sense for proper use of it. The only purpose they could want to use it for would be to smear.

The Court: I will hear your side in just a few minutes, Mr. McConnell. I have a criminal matter which I have to dispose of, and then we will resume.

(Whereupon a short recess was taken, after which the following further proceedings were had herein, in chambers, to-wit:)

The Court: What do you have to say, addressing it first to the report of the Senate Committee which you claim is admissible, and second, to the transcript of the proceedings and the use of it?

Mr. Thomas McConnell: Well, the report of the Senate Committee is obviously a public record. I know that Judge Thompson has excluded it summarily and thinks it is pretty obvious it is not admissible for any purpose at all. He bases that on a statement which is contained in his brief, that everything is hearsay in a con-
98 spiracy case against everybody except the fellow who happens to testify to it.

Well, now, that is not the law and it never has been the law and until I heard it stated here today I never even heard it advanced. The law is, as I understand it, and I think we can furnish any number of cases on it, that once a conspiracy is shown to exist — of course, if we don't prove a conspiracy in this case we haven't any lawsuit. Nothing is going to go to a jury. It won't even get to a jury. We at least have to make a prima facie case of the conspiracy.

We are alleging a continuing conspiracy here that continued and had a fruition in getting rid of Parmelee as a competitor in this business. While that conspiracy was

going on statements were made by one of the co-conspirators.

Now, he makes a statement in his brief that statements made in the course of a conspiracy are not admissible against the co-conspirators, and that is certainly not the law. The Court of Appeals in cases I have tried myself has held that it is not the law.

Over the objection of the same law firm I argued
99 that question out in the Court of Appeals and Judge Minton wrote an opinion in which he said that statements made in the course of a conspiracy were binding on all the co-conspirators, once the conspiracy was shown to exist.

Now, here are statements which are made by Mr. Cross in a hearing —

The Court: Do you have that citation in your brief here? I do not remember it.

Mr. Thomas McConnell: No, I haven't. That is the Milwaukee Towne case.

Mr. Freeman: The conspiracy matters were briefed by Mr. Thompson in his reply memorandum. They weren't raised —

Mr. Thompson: I made no statement that a statement made in the course of a conspiracy is not admissible, and I make no such statement.

Mr. Thomas McConnell: Well, you did make it in your brief. I read it.

Mr. Thompson: What I say is —

The Court: Now, gentlemen —

Mr. Thompson: (Continuing) — that it has to be made in the course of the conspiracy or it is not admissible.
100 Mr. Thomas McConnell: All right. We are claiming that this was made in the course of the conspiracy. That is our contention.

The Court: Now, to what are you addressing your-

self, the Senate report or to the hearing before the Senate Committee?

Mr. Thomas McConnell: I am addressing myself to the Senate report first, which is a report made — a public record made on testimony that was taken concerning the subject matter of this lawsuit.

Now, Judge Thompson says that it is not binding on anybody except Cross, that nobody else —

The Court: He did not admit that it was binding even on Cross. That was my understanding. He said it was not admissible for any purpose in this proceeding.

Mr. Thomas McConnell: Well, it is a public record made after a hearing, made after the taking of testimony. Under the Federal Statute it is admissible in evidence if it is competent and relevant — I mean, if it is relevant to the issues we are trying.

By the way, your Honor, we did cite 168 F. 2d. 474. That is cited on page 44 of our brief.

101 The Court: Page 44 of 168?

Mr. Thomas McConnell: 168 F. 2d., 474.

The Court: All right.

Mr. Thomas McConnell: Which holds that it is a public record.

Mr. Thompson: Of course, it is.

Mr. Thomas McConnell: That takes care of the competency of it. The only question is whether it is relevant.

Now, what are we dealing with here? We are dealing with an investigation into whether or not a public official utilized his position of trust and confidence so far as the Government was concerned to make a deal whereby he was exchanging or offering to exchange or giving the impression that he was going to exchange what he could do for railroads on this Commission for getting help for his friend Keeshin. Now, that is the charge.

We have to prove it, of course, but assuming that we

do prove it, certainly the railroads were just as much under attack in that proceeding as anybody else. You can't have somebody dealing in an illegal or unconscionable or improper way with that transaction with the
102 railroads and not have the railroads involved in it, in view of this situation, and that is what they were trying.

So what happens? He up and resigns, right in the middle of the thing. The whole proceeding, it seems to me, is a terrific admission against Cross. He was charged with this. Nobody misunderstood what he was being charged with. He was being charged with using his position of trust and confidence to feather his own nest, to get a job with Keeshin, and to procure the joinder of the railroads in a scheme to get rid of Parmelee and give the business to Keeshin. That is what the charge is. That is what we are trying to prove.

To prove it you have to show that there was something that did occur. There was a public hearing by the Senate properly called, properly instituted, and a report was written and Cross in the face of the charged resigned and quit and gave up, even though he was at that time Chairman of the Interstate Commerce Commission. It is a terrific admission against him.

The Court: To summarize it, then, within this area and we are just addressing ourselves now to the re-
103 port, you contend that for the purposes of this trial you would have the right to introduce, as a part of the record, in that it is a public document, from the Annual Report of the Committee on Government Operations made by the Permanent Sub-Committee on Investigations, their statement which is contained on page 28 and page 29 of the report — maybe it goes further.

Mr. Freeman: To page 34, your Honor.

The Court: (Continuing) — through to page 34, which

contains parts of the testimony of the various witnesses who were subpoenaed to appear or appeared voluntarily, and which are just excerpts, that that should be admissible in evidence as a public document?

Mr. Thomas McConnell: Yes.

The Court: Including all of the —

Mr. Thomas McConnell: Everything that is in that opinion or in that report. It is a public record. It is so defined by the Statute. It is certainly binding on Hugh Cross. He was there.

The Court: You contend that that is admissible under the Stasiukevich vs. Nicholls case, 168, Federal?

Mr. Thomas McConnell: Yes, and we contend that once it is shown that Cross is in this conspiracy, and
104 that is what this charge was, really, a charge of a conspiracy in which he was a party, we have a right to show it against all of them.

The Court: What were the facts in that Stasiukevich case?

Mr. Freeman: I read the case and cited it, but I do not have it at hand.

Mr. Thompson: Well, the Stasiukevich case involved some hearing on deportation, and the Un-American Activities Committee had made a report that commented that the objectives of the Communist Party were thus and so and that finding of fact, the Court said, was admissible.

Of course, that case is like a mule: it has neither pride of ancestry nor hope of posterity.

The Court: I just wanted to get the cases clear. I will reach a conclusion on that. Do they go into the situation where you have just excerpts from the record?

Mr. Thomas McConnell: The Statute defines that as a public record. That is the Statute we are operating under here, and our rule in the Federal Court is that

evidence comes in which is admissible under either
105 Federal Court of State Court Rules. We have no question of competency. It is merely a question of relevance.

Now, Judge Thompson proceeds on the theory that any evidence that is prejudicial has two strikes against it before you start. If it hurts the other side, then there should be some reason for keeping it out. Now, I don't understand that it makes any difference whether evidence is prejudicial or not, if the evidence is competent or admissible on the theories that are involved.

It may be prejudicial or it may not, and I take it that it is prejudicial. We think it is very prejudicial and we think it is highly relevant and we think that it proves, taken together with the prima facie case which we establish by other evidence, that these railroads were in this whole thing together and that the charges that were made were true and that Cross admits they are true by giving up his position as head of the Interstate Commerce Commission and quitting in the face of the charges.

That is the only way he could stop this investigation from going further and that is what he did, and those
106 circumstances, I think, are highly relevant and highly probative to show what was going on here. Of course, they are prejudicial. Of course, they are prejudicial, but we are not bound by any such rule as that.

Now, if this testimony was taken and these proceedings happened in the course of this conspiracy it explains several things. No. 1, we claim that free of the interference of this investigation the conspiracy would have proceeded to its natural outcome, namely, that he would have been given a job, that he would have been given a house, he would have been given other things, and that was stopped when the investigation started, right in the middle of carrying it out.

He made contracts for a house, he was about to consummate his move out here to Illinois, and then along comes the investigation and he tells people, 'Don't mention this, or say anything about the house" and he tries to back away from the house deal and other deals.

With the whole thing put together, it may not say in so many words that this man is guilty of the things charged, but conspiracies of this kind are not done
107 out on the public highway, your Honor. You have to prove them by the indications that normally show up when this sort of illegal activity is going on. We didn't put these people in the position they are in. They got in there under their own power.

They got mixed up with this fellow Cross, and it seems to me under the rules that are applicable here they are bound by what admissions he made, by his conduct, by his statements, by whatever he did in the course of this conspiracy, and one of the things he did right in the middle of the conspiracy was run away from a Senate investigation which was started down there to determine whether or not what we are saying in this lawsuit was true or false. He walked right away from it.

The Court: I will hear from both sides on this.

Mr. Freeman: If the Court please, may I try to briefly indicate what this Stasiukevich case stands for as far as our citation is concerned?

The Court: Yes.

Mr. Freeman: It involved a naturalization pro-
108 ceeding in which there was a denial of naturalization on the ground that this individual advocated overthrow of the Government, was a Communist. In support of that position there was introduced a report of the Un-American Activities Committee which had to do with and which made findings with respect to an organization of which this Defendant was a member.

Now, the report was received and here is what the Court of Appeals says with respect to that receipt—

The Court: This was a report with respect to an organization of which he was a member, is that right?

Mr. Freeman: That is right. It was the International Workers Order, and there were findings with respect to the character of that organization.

The Court: All right.

Mr. Freeman: The official report of the Legislative Committee was introduced, which characterized the International Workers Order.

"The Official Report of a Legislative or Congressional Committee is admissible in evidence in a judicial proceeding as an exception to the hearsay rule 109 where the report, within the scope of the subject matter delegated to the Committee for investigation, contains findings of fact on a matter which is at issue in the judicial proceeding", and they cite Wigmore.

"Indeed, the Court could properly take judicial notice of the report without its formal introduction in evidence but, though the Court may receive the report in evidence or may take judicial notice of its existence and contents, this does not mean that the Court must accept the findings and the report as indisputable truth. The findings are merely evidence of the facts asserted", and they cite several cases including the Harvard Law Review.

The Court: Was this a hearing before a jury?

Mr. Freeman: No. This was a naturalization hearing without a jury.

The Court: There you would have an entirely different issue from the one which is presented here, and that is, as to whether this whole report, and I went through the report here, would be prejudicial when you consider all of the other elements.

110 I am not ruling on it, but within that area there is a question in my mind of having a report of this type with the partial quotes which you have in here of testimony without the whole record. In other words, you are putting in a small part of the record.

You come down then to the area that if you can put in a small part such as this, whether you can put in this whole record where it was not a trial, but was merely interrogation primarily by the United States Senate, whether that would be admissible. I think they both fall within the same area because the report that you have here just gives excerpts from the testimony and then we have the whole report, and certainly a Court without a jury is in a much different position than the Court with a jury on the admissibility of this type of evidence.

Mr. Freeman: Putting aside for a moment the matter of excerpts that you raise, certainly the Committee's findings and conclusions as contained in this report, the Committee's recital of the fact that the investigation commenced on September 15th, which is an important 111 fact, and the Committee's conclusions with respect to Cross's resignation, the reasons for it and the fact that they agreed he had acted indiscreetly and he promptly resigned, these findings certainly should be admissible as embodied in an official report.

It is possible that we might limit our offer of this to the findings that the Committee reached in this investigation without reference to or without submitting the excerpts which are only partial excerpts of the record.

The Court: What do you say with reference to the record here?

Mr. Freeman: The transcript?

The Court: The transcript.

Mr. Thomas McConnell: Well, that transcript is largely testimony of Cross.

The Court: Do you contend that the whole thing is admissible, or that it is just admissible for the purpose of impeachment, and if it is admissible for the purpose of impeachment whether or not there should be excluded from it the fact that this was taken before a Senate Committee?

Mr. Thomas McConnell: I do not see any reason at all for excluding the fact that it was taken before
112 a Senate Committee.

The Court: All right. As to the first question your argument seems to be in the tenor, in reading the briefs, that it goes beyond the area of use for purposes of impeachment.

Mr. McConnell: Oh, yes. We are entitled to use this as part of our substantive case. These are statements which are made in — call it a quasi-judicial proceeding or what you will, they are made under the charge of conspiracy, the charge of illegally operating together with these railroads to exclude us as a competitor in a very large segment of Interstate Commerce.

That is the charge that is made, and here is what he is saying, and the conspiracy was still going on. Now, in that situation I know of no law that says you cannot use whatever the conspirator says in that situation, and one of the things you have to find out is in what context he said it. Why did he say it? Where did he say it?

We are using it to show and we are trying to prove that a conspiracy exists. He concedes that it is admissible against Cross. Now, if we prove that they are all
113 in the same conspiracy, that they are all trying to accomplish the very same thing that is being charged here by the Senate, under all the law I have ever heard of in conspiracy a statement, testimony, an admission made by one co-conspirator in the course of the conspiracy where they are denying it, trying to cover it up, and

where it is still in operation — it had not been concluded at that time — is admissible; it is competent evidence.

The Court: Let me ask this: Within that area you cite the cases here of United States vs. Trenton Potteries and Pan American Petroleum Transport versus the United States. There the Government read into the trial record at length testimony given at a Senate Committee hearing. The Supreme Court sustained the Trial Court's ruling that such testimony was admissible.

In these cases, were any of them cases where you had multiple Defendants? The Potteries case, as I understand it, had to do with the whole group. I will examine them. You don't have to read them in detail now, because I will examine all the cases we have here, but did that involve a comparable situation where you just had
114 one party to the so-called conspiracy, or did that involve an industry, the investigation? I am just —

Mr. Thomas McConnell: It involved a number of companies.

The Court: Yes, but I mean, in other words all of them were in at the hearing? Here we have one official who was before them. I just wanted to —

Mr. Freeman: You mean the Legislative hearing?

The Court: Yes.

Mr. Stevens: I think in addition, at the Legislative hearing in that case there was involved the point that the hearing showed there was a connection between the Defendants and a group of unsavory characters, and the Court describes them; they are people of questionable background.

The real objection there, which seemed to have much more force than here, was the fact that the investigation showed an association between the Defendants and people who were alleged to be part of the underworld, so there

was a very serious element of prejudice there which
115 the Court said nevertheless would not prevent the admissibility of the fact of the investigation if it was otherwise relevant and material, which it was in that case, and of course, it is here also, we contend.

Mr. Freeman: In other words, the Legislative investigation, the State Legislative investigation in Trenton Potteries, went into situations that were broader than the conspiracy action for which it was ultimately used.

The Court: Well, I just have an excerpt in the reply brief. We will check into that, but you contend that you have the right, so we have it clear, to introduce this entire record —

Mr. Thomas McConnell: Yes.

The Court: (Continuing) — as a part of your case in chief.

Mr. Thomas McConnell: That is right.

The Court: In the trial of this cause.

Mr. Thomas McConnell: Yes.

The Court: Then you further contend —

Mr. Thomas McConnell: We are not talking now about impeachment.

116 The Court: I understand. That is a part of your case in chief.

Mr. Thomas McConnell: That is right.

The Court: Once that record is certified to, and that is a copy of the record, you contend you have the right to introduce it as part of your case in chief.

Mr. Thomas McConnell: That is right.

The Court: You also contend the same in connection with the report of the Senate Committee?

Mr. Thomas McConnell: Exactly.

The Court: I think that issue is squarely joined.

Mr. Meserow: May I say a few words?

The Court: Is there anything you want to add to that?

Mr. Thomas McConnell: The only other thing is this:

On that matter this morning, that Interstate Commerce Commission matter, I do not think we made quite clear to your Honor this, that the purpose of that evidence is to show the motive that was utilized to bring the railroads around to a position where they left Parmelee and went with Keeshin.

On the one hand, here was a man who was dealing
117 with matters which involved millions of dollars and he was asking a favor which might cost an individual railroad the difference between Tweedledee and Tweedledum, as far as the cost of the operation to the railroads was concerned.

Now, that becomes very important in this case because the only defense that these gentlemen are making, in spite of the law you have heard here this morning which does not find reflection in any law books, the only defense I have ever heard in this lawsuit is that the railroads were acting solely from a motive of bettering their economic condition by getting a competitor who would give them more for their money than Parmelee was giving.

Now, if the motive was not that, if the motive of the railroads was not to get a competitor who was giving them a better deal, and the facts show that they did not get a better deal, but the motive was to curry favor or at least go along with somebody who could help or hurt them, it is vitally relevant in the case, and again I say that the fact that it may be prejudicial does not go to the
118 question of whether or not it is admissible.

The fact that Judge Thompson threatens us with long hearings about all the cases before the Interstate Commerce Commission, and tremendous discovery, does not impress me in the least because we heard that same argument on the question of the counterclaim here and we ended up—we were going to have weeks and weeks

of testimony on that question and we ended up, I think, with four days. He is not going to bore a jury with a lot of things that are not going to help his case any and a lot of dry statistics on what happened to these lawsuits, and I just do not think that for that bogeyman we should depart from the rules of evidence which have to be applied in determining whether this comes in.

Even if it it does amount to that, I do not know of any rule which keeps evidence out just because the Defendant might have to bring in other evidence to meet it.

The Court: That was not the Court's attitude at all.

Mr. Thomas McConnell: No. I am not saying it is. I am talking about the contention that is made on the
119 other side of the table.

The Court: Well, I think that area is raised in your briefs. Now, did you have something to say?

Mr. Meserow: Yes. I would like to address a few remarks to the Court with reference to the Senate Report and the findings in those proceedings. Judge Thompson made the statement that any reference to the Senate investigation would prove prejudicial to a jury.

Now, I think this Court must take judicial notice of the fact that this same Sub-Committee with Senator McClellan as Chairman have been investigating many spurious characters over the past five years, such as the Glimcos and others, and there has grown up in the minds of the American public, who will be the judges in this case, that anybody who appears before Senator McClellan's Committee is guilty of something, whether he is or isn't. There have been many Fifth Amendments taken by witnesses, and so forth and so on, and the same prejudice would appear here to a jury if it were brought out that Cross or somebody else appeared before this Committee.

Now, I am the only one in this room who appeared
120 before that Committee at these hearings as counsel for Mr. Keeshin, who was a witness. May I say, if your

Honor please, that this was my first experience before a Senate Commission and I was rather surprised and astounded at the lack of judicial characteristics of such a proceeding.

In the first place, the doors were closed. No newspapermen could appear. The witness testified under examination by the Chief Counsel and by the Chairman and other Senators. The questions were objectionable, but I had to sit there and I couldn't object on instructions of the Chairman.

The Court: I think we are all aware of that, Mr. Meserow.

Mr. Meserow: I could not cross examine anybody. Certainly the testimony and the report of the proceedings are not proper evidence.

The Court: Well, here is how I sum it up. You have two areas. Either under the law it is admissible or it is not admissible, that is, the transcript, and that is the reason I wanted to have this conference today.

I know that there are many things that are ad-
121 missible that, in my mind, at times are prejudicial, but we have Court decisions on it or it is provided for by the Rules or it is part of the Code that it should be.

Now, the area to which I am directing this, and from reading these briefs this is an important area in this case, in my mind, is on the basis of the contention of the Plaintiffs that this is admissible in their case in chief, and that is the area I have to explore and find out. Either there are decisions holding that it is admissible in the case in chief or there are not decisions.

Secondly, we then come down to the point that if there are not decisions it will be up to me to determine it on the basis of what we have here and whether that would be prejudicial.

Then the second area involves this report. They contend it is a Government document and is admissible as such, with excerpts from the testimony. Those are things which, in the first place, we have to determine by law, if there is any law. If there is not law, then they must be determined by reasoning on the basis of principle,
122 and I think with able lawyers such as we have here, we certainly are aware of what is admissible and what is not admissible in the course of an ordinary trial.

It would then be governed by the rules of evidence if there are no exceptions under the Federal Rules, so what a man has to do—I think we are aware of that before these Committees, and I do not want to preclude you, but we do have a number of other items to cover.

Mr. Meserow: Just one more minor point, and that is this: They contend that in November, 1955, when the Senate Committee conducted its hearings that this was another step in the alleged conspiracy. Now, it is our contention that the conspiracy—that is, the alleged conspiracy was over on June 13th, 1955, when the contract was awarded to Keeshin.

Now, in my brief, and I am not going to burden the Court now, the acts of the Senate Committee were not the acts of any of the Defendants, the alleged co-conspirators, none. They did nothing.

As a matter of fact, this Senate investigation, as we set out in our brief, was not started by us, but by the
123 Plaintiffs. It was instigated by them.

Mr. Freeman: Your Honor—

Mr. Thompson: I have a couple of comments, please.

Mr. Freeman: Before you do that, Judge, I believe you had an opportunity to read Mr. Meserow's memorandum.

The Court: I did.

Mr. Freeman: There are a dozen pages in which he

refers very glowingly to me, and all of the activities that I had. Now, I would just like to say, and I am not going to labor the point, that those statements are false in almost every instance, false with respect to any activity that I had in February, 1955, false wih respect to anything that he charges I did in appealing to Cross for any influence or anything else.

This is typical of Mr. Meserow and his client and—

The Court. Well, now, here—

Mr. Freeman: Just let me say this—

The Court: Let me get this straight on the record: I am not going to be trying lawyers in this cause, and if there is anybody steps off base in any area such as that I will deal with that problem.

This is litigation between the Plaintiff and Defendants and when I reach the stage in the trial of any case where I am going to be trying either counsel, I will handle that in my own way and I assure you it will be an effective way, so at no time in the handling of this case am I going to be trying counsel unless there is a genuine reason where he violated the canons of ethics or his conduct within the court room is not that which I expect of a lawyer, and then I will deal with it, so let's not involve our record here with any recriminations from one side or the other.

Mr. Freeman: I just wanted that opportunity.

The Court: All right.

Mr. Freeman: I just also would like to point out that about a year or two ago there was a similar attack against me professionally, which was tried before Judge Perry and he threw it out, after a few days.

Mr. Stevens: An attack brought by Mr. Keeshin.

Mr. Freeman: Brought by Mr. Keeshin, also.

The Court: Well, that is my way of handling a law-

suit. I am not going to be trying the lawyers at any
125 time. If occasion does come up I will deal with it
in the way I feel it is proper.

Now, was there anything more you had to say in this area, Judge Thompson?

Mr. Thompson: Yes, if the Court please. First, with respect to Mr. McConnell's supplement on the Interstate Commerce Commission matter, Mr. Freeman in the course of his presentation this morning on the question of whether or not this was an ex parte matter, this multi-million dollar interest matter of the B. & O., says that the law requires that notice be given to divers and sundry parties and that the Commission shall rule whether or not selling these securities must be submitted to bids, and so on.

Now, that being true, and I accept his statement as true, because I know he has had experience in this field, then if this matter of the B. & O. thing comes into issue and there is a challenge that this was an ex parte proceeding, which I assume there will be, then we will have to develop the facts as to whether it was or not. We will
have to develop whether or not all these notices were
126 given and whether anyone else ever came into the
proceedings so as to make is adversary or whether it continued as an ex parte proceeding and all that was left to do was to carry out the normal procedural steps.

Obviously, also, we would have to bring in all of the Commissioners to testify as to what action was taken by them in connection with this matter, whether Cross had antyhing to do with it officially and whether or not Cross undertook to influence them, and so on, and so on, and so on. The whole thing would have to be tried, which would be most distasteful and an experience which I would not want to have to go through, but I don't see how we could avoid it if the issue is ever presented.

We would have to try it out, and that would be true also

of any other Commission matters that were brought out in Court, because we couldn't let it stand with the implications that would naturally follow without a full explanation.

Now, getting back to this other, first on the question of the report of the Senate Sub-Committee, which occupies pages 28 and following in this pamphlet to which your
127 Honor referred, the report starts out with the statement that part of the report is based upon investigation outside of the Senate Hearing by investigators, and that it was reported to the Committee by these investigators that there was this personal relation of Hugh Cross to the contract negotiations, and then it goes on to recite a lot of other hearsay matter and winds up on page 30 with the statement:

> "In view of the fact that the information secured from independent sources tended to support the initial allegations but was at variance with that secured both from Mr. Cross and Mr. Keeshin, and also because the information provided by Mr. Cross was in certain respects different from that provided by Mr. Keeshin, Executive Hearings were held by the Sub-Committee . . .",

and so on.

In other words, that brings in the fact that there was all this preliminary investigation and all that hearsay stuff. Now, the report itself, I contend, is hearsay as to everybody, Cross and everybody else. I don't say it is admissible against Cross. It is not admissible against
128 Cross. It is hearsay as to everybody, because it is a statement of a conclusion that was reached by whoever drafted this report. The Committee adopted it, of course.

Now, in addition to that the Committee winds up with

its conclusion that the Sub-Committee feels Mr. Cross made a mistake and acted indiscreetly in his position as Chairman of the Interstate Commerce Commission.

In other words, it not only purports to recite some facts which might be findings of fact if they were properly stated, but also winds up with conclusions and deductions from the testimony they heard, which is the rankest sort of hearsay, so this report is not only hearsay, but it is hearsay based on hearsay.

As far as the report is concerned, it seems to me, as I previously expressed it, so obvious that it is not admissible in any court of justice that I do not want to spend any more time on it.

Now, on the question of introduction in evidence as affirmative proof in the first instance of this report
129 which, of course, consists, as a mere inspection of it shows, of statements of the special counsel as to what he had heard, of statements of Senators, of speeches of Senators, of every sort of thing that would never be allowed in any Court Room, and to bring it in through the back door by reading to a jury what no Court would ever permit to take place in a Court Room, is the grossest sort of violation of the fair administration of justice.

I cannot conceive of any such thing and I do not think they can ever find any authority that would allow the reading in the case in chief of this report with all of its vicious implications.

Now, I have not said that this report would be admissible against Cross. It would not be admissible against him. It would not be admissible against anyone. Cross could be examined, if he stated differently, by way of impeachment, and also statements made by Cross there could be read as admissions of Cross, there is not any doubt about that as far as Cross is concerned, but I am sure the Court knows of the many, many cases where

there are multiple defendants, where an admission of
130 a defendant out of a group, which involves other De-
fendants where they did not participate in the ad-
mission, they did not adopt it as their own and had no part in it, is not admissible.

An admission of an alleged co-conspirator is not admissible where it becomes a narration of past events. That is well established. It is only where it occurs during the conspiracy and in the course of the conspiracy and in furtherance of the conspiracy.

Now, nothing Cross said in this statement before the Senate Committee was in the course of the conspiracy to limit competition, if you please, to get this contract, and secondly, nothing that was said here was in furtherance of the conspiracy. That is, what he said did not further the conspiracy. It was exactly the opposite of furthering the conspiracy.

It was after the culprit had been apprehended, if you please, and he is being questioned by the police and he makes a statement. That is not admissible against any
of his co-defendants. That is so well established that
131 I do not want to burden the Court with further em-
phasis on the point.

It seems to me that if they were permitted to introduce this, no defendant could have any defense against it. There isn't just any way to do it. Now, it is not a question of evidence not being admissible because it is prejudicial. I have made no such statement.

What I say is that if evidence is competent then it can be admitted, but if it is incompetent it cannot be admitted against any of these people, they are not bound by it, and in the second place, if the introduction of the evidence is so prejudicial that it so far outweighs the probative value of the evidence that is admissible, then the authorities are pretty well settled, it seems to me, that the Court in its

discretion should deny that diversion and that distraction of the jury by not allowing it.

Now, I want to make only a summary again, that whether this hearing of the Senate Committee took place or not, the mere fact of the Senate investigation proves nothing.

It does not prove there was a conspiracy and it doesn't
132 even tend to prove it, nor does it prove there was any act of any of these defendants in furtherance of the conspiracy, so it seems to me it is clearly irrelevant to the issue as to whether there was a Senate investigation.

The limitations which I have already expressed are the only purposes for which it can be received, it seems to me, and whether you can find authority one way or the other on some of these things is not so important because some of the plainest things in the laws of evidence are not supported by authorities because nobody every advanced any such cockeyed ideas and therefore no Court was ever called upon to rule on them. No one ever offered any one of these things in evidence before.

The Court: I am going into these things in all areas, because I want the benefit of all your views on them.

Now, can we go on to the next item, or series of items. They all fall, in my mind, more or less into the same category. I am referring now to the evidence concerning

Cross's 1955 real estate transactions, that is, the home
133 in Washington and the home in Deerfield, and within that same area comes the sale of the trucks by the Carrollton Farm Supply. In other words, they all fall more or less in the same category, in my mind, of evidence.

Mr. Thompson: Well, they are all in the same category, your Honor, but they all must be separately considered.

The Court: Well, I believe that, but I mean, we can discuss all three of them at once.

Mr. Thompson: Fine.

The Court: I thought we could discuss all three of them

at once rather than breaking them down and having a separate discussion on each item.

Mr. Thompson: On this question of Cross's 1955 real estate transactions, the facts are not in dispute. The Court is in just as good a position to rule now as it ever will be, because there is no dispute with respect to any of the facts.

Cross did list his home down in Washington—of course, when he listed it is another issue, but I think the evidence shows it was listed many months if not years before
134 this and that there had been negotiations for some time about selling this home which, after the children left, was too big for them and he had the problem of traveling this distance, but that is neither here nor there. That is an issue which is not disputed.

The facts will be clear and the facts will be undisputed if they were to be received in evidence.

Now, Cross did sell his home in Maryland, which is near Washington, D.C., and he did buy a home in Deerfield. They say it is competent proof to impeach Cross's statement that he did not expect to leave the Commission when he did leave it, that he expected to serve out his term. Well, assume that is true, that it does contradict, and I think it does tend to contradict that aspect of the case: No other Defendant had any part in it, no other Defendant knew anything about these transactions so far as any evidence that has been presented showed. They were all private transactions of Cross. They involved the sale of a home which was held in the name of his two children, his son and his daughter, which was their
135 property as far as anything that has been developed so far is concerned.

Now, that property was sold and the property in Deerfield was bought and that was put in a land trust in one of the banks here in the name of these two children.

Now, the proof of all of that, pro and con, will take a lot of time on the trial. It will divert from the issues in this case. It doesn't prove that there was a conspiracy, it does not even tend to prove there was a conspiracy, and certainly—

The Court: Well, let me ask—

Mr. Thompson: (Continuing)—it is prejudicial as to every other defendant.

The Court: Let me ask you a question in that area: If it is shown in the Plaintiff's side of the case that Cross made the statements, or anything on the basis of admissible evidence, that he intended to come to Chicago to live and to work with the Keeshin Trucking Company—I believe it was Mr. Johnston who said he had heard that rumor—then as a part of the showing on that, that there was that intention in that he had denied that, isn't
136 there an area here to show that he was selling his home in Washington and that he had purchased a home, to show that that intention was correct?

Mr. Thompson: Well, I say—

The Court: I just propound that question. If that comes into the record here and on the basis of competent evidence, then shouldn't they be allowed to show that he did take steps to do that?

Mr. Thompson: Well, I say the question of whether or not—if Cross were the only defendant here, whether that would be admissible or not would be rather clear, that it might be admissions against Cross, if that became an issue as to whether or not he was coming to Chicago to go to work for Keeshin.

Of course, the evidence will not show that there was ever any agreement between him and Keeshin, but assuming that as a premise, then we have that. Now, whether or not this rumor that Mr. Gurley—he is the one who said he had heard the rumor.

The Court: Mr. Gurley, yes.

Mr. Thompson: He is the one who stated he had
137 heard the rumor that Mr. Cross was going to be associated with Keeshin. Now, whether that is competent evidence or not is very questionable.

The Court: Yes. I do not know whether—

Mr. Thompson: It is very questionable as to whether you can report a rumor, because Mr. Gurley says he paid no attention to it whatever and he never discussed it with anybody. Mr. Johnston testified that he talked with Cross about a rumor he had heard that Cross was coming to Illinois, returning to Illinois, but even Mr. Johnston made it very clear that Keeshin's name was not mentioned in the conversation.

The point I want to make and the point we do make is that none of these other defendants had any contact whatever with this matter and therefore the receipt of this evidence in the case with all these multiple defendants is going to be highly prejudicial to these defendants, not because it is competent evidence against them, but because it is evidence incompetent against them. In other words, it is not any act in furtherance of any conspiracy. It merely proves that Cross lied about something, if that should
138 be the development, and these defendants are not responsible for that.

These other defendants would be highly prejudiced not only because of the admission of evidence with which they had no connection whatever, before or after, but also because it would be a diversion. Now, the jury would have to decide. They would have a separate and independent and collateral issue to decide as to why did Cross make this puchase, and so on and so forth?

Now after they have decided it, what does that decide in connection with the conspiracy that is charged in this complaint? It seems to me it is not only highly in-

competent as to all these other defendants, but it is also prejudicial.

Now, the second category of this group that your Honor mentioned is the one that really open things to a very vicious argument which could be made. When Cross got ready to sell this property he listed it; at least he wanted to sell it, it was available for sale. Mr. and Mrs. Klein were looking for a property to buy. They had placed this matter with a real estate broker, to find them a piece of property.

They looked at many pieces of property, so they
139 say. They drove by this property and Mrs. Klein saw it. She was impressed with it and decided that was a piece of property in which she would be interested, and she inspected the property and the Crosses were in the house at the time and she talked with them about the property.

Mr. Klein, which is one of the numerous coincidences in this case which they want to blow up into a terrible thing, was an employee of the Pennsylvania Railroad. They say he was a subordinate of Mr. Capri, who was the Vice-President. He was one of hundreds of subordinates of Mr. Carpi, of course, and one of thousands of employees of the Pennsylvania Railroad. Now, Mr. Klein testified positively by their own examination that he had no idea of who Hugh Cross was, that he knew nothing about who owned this property or who was selling the property, that the whole transaction was completed before he knew anything about it, and that he paid for it in cash with his own money. So we would try that issue.

Now, they are going to use it, of course, for the very vicious and evil purpose of arguing that because the
140 Pennsylvania Railroad is one of the Defendants in this case and because Mr. Carpi is one of the Vice-Presidents of the Pennsylvania Railroad and because Mr. Klein was an employee in the department over which this

Vice-President had supervision and because Mr. Klein bought this property and paid for it in cash, therefore it must be confirmation of their suspicion that the Pennsylvania Railroad bought this property to bail Mr. Cross out of his predicament.

Well, of course, there just is not any possible basis for any such suspicion, much less proof, but we will try that whole thing out for a day or two and you will never get it out of a jury's mind, if it is admitted in evidence under these circumstances I have indicated, that the Pennsylvania Railroad did not buy the property to bail Mr. Cross out, which is so far from the truth that there just isn't any basis for even a suspicion, but imagine the argument that would be made on that score, and you can imagine it and your imagination does not have to run very far to get to it.

Now, what is the next step? Your Honor properly suggested that these things are all tied together in
141 their presentation of it, and therefore we can present them together. The Lasham Cartage Company decided to buy some trucks, which was no unusual procedure for them. They took bids. They got information from the International Harvester Company, I think the evidence shows.

They asked Hugh E. Cross, the son of Hugh Cross, of the Carrollton Farm Supply Company, which is down in Green County, Illinois, to submit bids. Hugh E. Cross submitted a bid, or the Carrollton Farm Supply Company submitted a bid, a furnish these trucks at $150 over cost for each truck, and there were thirty of them. Now, there isn't the slightest bit of evidence in this case, and all the evidence is to the contrary, that any of these defendants knew anything about this transaction. There is no evidence that any defendant knew anything about the transaction.

The Court: I believe there is a statement in Plaintiff's

brief that Keeshin had knowledge of it and talked abou
it and also arranged to—but nothing was done about it
something about a tire agency.

Mr. Thompson: That is another subject.

142 The Court: That is another subject?

Mr. Freeman: Yes. Keeshin so testified, yes.

Mr. Thompson: That is another subject.

The Court: Go ahead, Mr. Thompson.

Mr. Thompson: Absolutely nobody that is a defendan
in this case had any connection with that transaction ex
cept that they undertake to say that because Mr. Forgash
who was a long time friend of Mr. Keeshin and who wa
also an acquaintance of Mr. Cross—Forgash is the Pres
dent of United States—

Mr. Meserow: U. S. Freight.

Mr. Thompson: (Continuing)—U. S. Freight. U. S
Freight owns Lasham Cartage Company. U. S. Freigh
was in turn owned in part by—

The Court: The New York Central, 45 per cent, o
something like that.

Mr. Thompson: (Continuing)—by Linden Securities.

The Court: Oh.

Mr. Thompson: And Linden Securities was owned b
the New York Central. Therefore, it must be assume

143 that because Mr. Forgash and Mr. Keeshin wer
friends and talked over the telephone, and that b
cause Forgash talked to Cross in connection with h
business with the Interstate Commerce Commission, b
cause young Cross was the son of Hugh W. Cross, a d
fendant, because Lasham Cartage was owned by U. S
Freight and U. S. Freight in turn was part owned b
Linden Securities and Linden Securities was owned b
the New York Central, therefore the New York Centr
must have had something to do with this purchase, and
being the only defendant, they finally get back to a d
fendant.

Now, there is not a syllable of evidence to prove any such thing and there is no indication that anybody had any part in this transaction excepting the Carrollton Farm Supply Company and the Lasham Cartage Company people.

The Court: Let me ask you this: Does the record on the basis of depositions clearly show that there was an advertisement for bids? Is that what you said?

Mr. McConnell: I don't think so.

The Court: Well, you said something about bids.

Mr. Meserow: May I clarify that?

144 The Court: Yes.

Mr. Meserow: Mr. Monaco, the manager of Lasham Cartage testified at the deposition hearing that he recommended to the executives of Lasham Cartage that they buy International Harvester Company tractors rather than White or any others that were under consideration, and the executives took his recommendation and asked him to request bids.

Bids were made from the International Harvester dealer in New Work, Chicago, and the Carrollton Supply Company. The Carrollton Supply Company was the cheapest and that is why it was accepted.

Mr. Thompson: All right.

Mr. Freeman: I will tell my version of the story in a minute.

The Court: Proceed, Mr. Thompson.

Mr. Thompson: Anyway, there is no proof of any kind that there is any connection at all. Now, then, this other thing: Keeshin suggested to young Cross that he get the agency for the Springfield Tire Company and that

he get some of this State of Illinois business which he 145 thought young Cross might be able to get.

There was some horsing around about that but young Cross never got a contract from the State of Illinois and that's the end of that story.

Now, they tie all these things together. They say young Cross in April, 1955, sold thirty trucks at a $150 profit on each truck, which is $4,500, strange as it may seem, and then in July, 1955, months later, Hugh W. Cross buys the Deerfield property and makes a down payment of $4,500, so therefore this $4,500 must necessarily be the $4,500 Hugh Cross used out there with no evidence on earth to support any part of it, not even the basis for a suspicion, and yet you tie all these things together and you can make a terrible story out of it.

It will take one week to try these other collateral issues and these other defendants will be sitting there absolutely helpless, absolutely helpless, with no way on earth for them to meet any part of these three transactions.

Mr. Freeman: This is a very, very significant part of our case. There is no doubt about it.

146 First, with respect to the offer of an executive job, your recollection and Mr. Thompson's statement do not tell nearly the whole story. It will only take me a minute to indicate to you the number of people who have already testified with respect to that.

Mr. Johnston, who is President of the Illinois Central Railroad, testified in depositions and at the Senate Hearing, and he testified in depositions that whatever he said at the Senate Hearing he will stand back of, that the statements there made were correct and that he would reaffirm them, but he did testify that he had heard a rumor —he was the man that heard the rumor—in Chicago, possibly from a railroad man, he was not sure, that on April 29th, and that date is the result of the elimination of other dates, he was in Washington, D.C. attending an American Association of Railroads Presidents' Meeting and he went in to see Cross and he asked Cross whether there was any truth to the rumor that he was going to go with Keeshin in the event Keeshin got the transfer con-

tract, and Keeshin said, "Yes, if things work out satisfactorily", and there was no question about Mr. John-
147 ston's reference to—

Mr. Stevens: Cross said it.

Mr. Freeman: I mean, Cross said it to Johnston, and there was no question about Johnston's testimony, that he was referring to Mr. Keeshin's transfer company and the procurement of the transfer contract by Keeshin and that Cross would go with Keeshin in an executive capacity.

Cross made a lot of statements about what his conversation with Johnston was and Johnston categorically denied each one of them in deposition. This is Mr. Johnston.

Secondly, Mr. Gurley, President of the Santa Fe Railroad: His testimony, despite everything Mr. Thompson says, was to the effect that he heard a statement, not only rumors, but a statement in Washington and possibly from a railroadman, although he was not sure, and this testimony is on pages 2391, 2396 and 7, 2399 and 2404 of the deposition, and Mr. Gurley filed an affidavit with the Senate Committee in which he said:

"Some time prior to the awarding of the contract,
148 in the spring of 1955, I heard rumors and statements to the effect that Mr. Cross would become associated with the Keeshin organization if it should succeed in securing the transfer contract."

Now, let me stop a minute, if I may, collaterally, in connection with Mr. Gurley's testimony. We took his deposition and we took the deposition of Mr. Duffy, who was Vice-President in charge of Traffic, and Mr. Gurley testified that on June 2nd, and the decisive meeting was June 3rd, of the Committee—on June 1st or 2nd, I am sorry, shortly before June 3rd, he called in his executive Vice-President, a man named Ryden, and he said, "Will you bring me up to date on the transfer matter?"

My Ryden went in to see the Traffic Vice-President, Duffy, and came back with a recommendation that had been made by their principal officers in the Passenger Department, Mr. Sloan and Mr. Anderson, strongly—I use the word advisedly—strongly recommending continuation with Parmelee. This recommendation had been made a week prior.

149 The memorandum also contains the statement that contracts had been made by Keeshin with the executives of the B. & O. Pennsylvania, Chicago, North Western and possibly other railroads for a favorable consideration. This was the reference to Cross's contact, and this was contained in the memorandum that Mr. Ryden brought back to Mr. Gurley.

What did Mr. Gurley do? He looked at the recommendation for Parmelee and said, "We will vote for Keeshin", and when Mr. Thompson said, "What reasons did you assign?" he said, "I don't assign reasons", and then when Mr. Ryden later testified he said Mr. Gurley did not assign reasons, but Mr. Duffy testified that Ryden came back to him and said, "Is it possible without hurting the Santa Fe Railroad to vote for Keeshin?"

That was the kind of inquiry that was made by Mr. Gurley, knowing of contacts with other railroads and knowing by statement, not only rumor, but by statement which he heard in Washington, possibly from a railroad man, that Cross had been promised a job with Keeshin if Keeshin got the contract.

150 The third President is Mr. Feucht of the North Western Railroad, and Mr. Feucht testified that on April 13th or 14th Mr. Brennan, his chief passenger man, reported that there were rumors floating around Chicago that Cross might get a job with Keeshin. Feucht said—well, he used a vulgarity and said that he didn't believe it, but it was brought to this attention.

Also, Brennan testified that he had heard Cross had made contacts with other railroads. There are memoranda to that effect. We have two memoranda, one where the New York Central, the Chairman of the Committee, called the Illinois Central member of the Committee and said to him, "I have heard that the Presidents' Officers are being"—Presidents plural—"are being contacted" and this was April 21st, after Cross had been to see Mr. Simpson in Baltimore and after he had contacted Capri and possibly the New York Central, too, as we will point out—"the Presidents' Officers are being contacted and therefore, at our next meeting on May 19th, let's have the men of the highest stature present", because there was a question of policy involved, and they did.

151 The B. & O., the Pennsylvania and the North Western brought in their top brass to attend that meeting; not the Committee members that had proceeded with this problem over a ten-year period prior, but their top people. Policy was involved.

So much for Feucht. He heard of Cross's affiliation with Keeshin in the event of a contract, and what about Keeshin? Keeshin testified in depositions and testified at the Senate Hearing and Keeshin testified that he had offered Cross a job in connection with a contemplated bid for the Chicago West Towns Railway in 1954, that he had never rescinded that offer, that he had a general understanding with Cross that if ever Cross were to leave the Government Service he could have a job with Keeshin, and that that understanding was in existence at the time of the transfer negotiations. This is a rather broad type of concession for a man to make, and this, too, is documented.

So we get to the point where there is a large volume, not a single little rumor somewhere, as Mr. Thompson would have you believe, but there is a large volume of

152 proof that Cross did contact these railroads for the purpose of procuring favorable consideration, that the railroads knew, and most of them did as we can prove in this record, knew of the contacts and knew that Cross was going to have an executive job with Keeshin.

In proof of that, if proof were further needed, is the fact that while the contract was awarded to Keeshin on June 13th Cross came to Chicago two weeks later, on June 28th, to look for a home. He decided upon it on June 30th. He executed a contract on July 11th listing, for the first time the record shows, listing his Washington home for the first time since he had lived in it, on July 11th also. He listed his Washington home, he signed a contract to buy the Deerfield home and he interlined the contract, "Possession of this house to be forgiven to the purchaser by September 15th", and September 15th is rather an important date, because Keeshin's service to the railroads was to start October 1st, and when Cross returned this contract to the seller he returned it with a letter of transmittal in which he said, "Keep this confidenial, keep my name out of it"—

The Court: That is in the brief.

153 Mr. Freeman: (Continuing)—and you know the rest of it.

So here is the matter of the house, which goes very, very much to demonstrate, or which is, I should say, a concrete demonstration of the statements that were made, denied by Gross, mind you; Gross denies that he ever had an offer of a job or ever contemplated one with Keeshin, but everything else is against that denial, including his activities.

I do not have to talk about the sale of the Deerfield house. That—

The Court: Right there I want to pose one question. All of that took place after the supposed conspiracy was

completed, after all the other elements that entered into this, isn't that correct?

Mr. Freeman: No.

The Court: That is, the sale of the house?

Mr. Freeman: No. We charge that the conspiracy continued; that the conspiracy continued until we were destroyed.

The Court: When did the sale of that house take place?

Mr. Freeman: The sale of the house took place 154 in May, 1956, by contract completed by July.

The Court: Your complaint is filed in February.

Mr. Freeman: February, 1956, but we do contend that the conspiracy was continuous.

The Court: Was it a continuing conspiracy?

Mr. Freeman: Yes.

Mr. McConnell: Oh, yes.

The Court: You have a right to bring in all the other elements, so it is your contention that you would have the right, if anything took place in the next two weeks—

Mr. Freeman: It still continues.

The Court: (Continuing)—to go into it?

Mr. Freeman: Yes.

The Court: It is a continuing conspiracy?

Mr. Freeman: Yes. This was in furtherance of the conspiracy that was ultimately there.

The Court: All right. I understand your contention. Proceed.

Mr. Freeman: Now, with respect to the Deerfield house, Cross moved into that in December, 1955. We filed our suit in February, 1956. He had previously, in November, 1955, sought to cancel his contract to purchase saying, 155 "In view of the Senate Investigation I want out and I will forfeit the $4,500", and he couldn't because of an estate problem, but he moved in in December and he listed the house for sale a month or two months after we

filed this suit, in May, 1956, and it was taken off his hands by M. E. Klein.

Now, this is a fact of life. I mean, the Pennsylvania Railroad is very much involved here. Mr. Carpi is very much involved here, as is Mr. Forgash. It isn't necessary for us to establish all of the foundational information now. There is a relevance and there is a competence to this proof.

This is what happened to the Deerfield house. It was sold on a contract executed in May, 1956, to M. E. Klein, who was an important man. He was the head of the Coal Division of the Pennsylvania Railroad. He wasn't one of thousands of employees. He was a department head.

Mind you, your Honor, a significant thing that Mr. Thompson mentions: They didn't know who Cross was.

This transaction was handled by their Assistant
156 General Solicitor, Haberkorn. Haberkorn was the Attorney on the Legal Committee during June, July and August, negotiating the contract with Keeshin. During that time, also, the Legal Committee, and in September and October, began considering the problems of the Cross Senate Investigation. They had reports about Cross's investigation. It was something of considerable moment when Cross retired.

Now Klein has the temerity to say, "I met Mr. Cross, I negotiated with him, and I didn't even know who he was." Well, I think this goes to determine whether or not any part of the story can be believed, when his own counsel and the counsel for the Pennsylvania Railroad who was supplied to him to assist him in making this purchase, when his own counsel was part and parcel of this whole problem, which was a serious problem facing the Pennsylvania Railroad at that time when Cross was being investigated.

But let me go on to the Tire matter, if I may.

The Court: Just a minute, please. We will take a short recess, gentlemen, and then resume.

157 (Whereupon a short recess was taken, after which the following further proceedings were had herein, to-wit:)

The Court: You may proceed.

Mr. Freeman: If your Honor please, let me say one further thing on this Pennsylvania business, and M. E. Klein. The record is clear that Cross visited Mr. Carpi in Philadelphia, in April. Cross called him for an appointment.

The record is further clear that Cross made six or seven toll calls to Mr. Carpi, either from his home, or when he made them from the Commission he charged the calls to his home, and the record is clear on the basis of the Finance Officer's statement, of the Interstate Commerce Commission, that when a Commissioner charges a call to his personal phone no record of that call appears on the Commission's files.

The statement is made, however, that Mr. Carpi and Mr. Cross never discussed the transfer situation; they were just discussing freight car shortages. Mr. Cross did testify that he may have talked about the transfer thing with Carpi, and that occurs, I believe, on page 791, as I remember.

158 Mr. Forgash, who is very deep in this thing, but we haven't really gotten into an argument on it, also admitted that he may have talked to Carpi about the transfer matter. The Santa Fe Railroad on May 23, 1955 by their responsible officers, said this in a memorandum to their Vice-President:

> "We understand that Mr. Keeshin has appealed to the executives of the B. & O., Pennsylvania, Chicago and North Western and possibly other lines for favorable consideration of this bid."

Mr. Keeshin testified categorically that he never made any of these appeals personally, no. The appeals were made by his representative, Cross, and there is no doubt about it, so that the Pennsylvania Railroad through Mr. Carpi exercised a very important position here.

We went into the records of these railroads and we found voluminous records in each one of the railroads—as a matter of fact, there is a format that they keep. You can go from one railroad to another and pretty nearly find the kind of information on the basis of a classification that they maintain, but in the case of
159 the Pennsylvania Railroad there is an amazing gap.

From February 1, 1955, until June 15, 1955, there isn't a single paper in the files in Philadelphia because Carpi, who is one of the largest railroad executives in the country, says that he doesn't deal with his staff on the basis of memoranda, it is all oral reports, but on June 15th there is a little memorandum from Carpi's underling saying, "I think you ought to send a note of congratulations to the Chicago man for the fine job he did in the Chicago transfer", and on June 16th Carpi does so, but no memoranda, no records from February 1 to June 15th. This is an amazing kind of situation which I think the jury likewise is entitled to know.

Let me go on from the Pennsylvania thing to the tire situation.

The Court: Yes. I do not want to rush you, but time is rushing on.

Mr. Freeman: I realize that. I will spend only a minute or two on this, because I think it is really so obvious.

The Court: Very well.

Mr. Freeman: The timing of this Kelly-Springfield
160 conversation that Keeshin had with Cross's son, the timing of this purchase of trucks that was made of Cross's son is very important.

Forgash was a very important executive in the New York Central hierarchy. He was President of the largest freight forwarding company in the world, U. S. Freight Lines, and it was a big subsidiary, a 45 per cent subsidiary of the New York Central through this Linden Securities.

The U. S. Freight Lines, or its subsidiary Lasham Cartage, which was merely an operating company, had been negotiating for International Harvester tractors, and they were negotiating in New York with the factory branch of the International Harvester Company, and that is the way it is normally done.

Big users buy their fleet use from the factory branches of the International Harvester, not from the little farm agencies, and the record is clear that in December, 1954 and in March, 1955, this was the character of negotiations that were going on.

But on April 6th Cross and Keeshin got together—161 first let me say, as the records show, that Keeshin first called Cross on March 23rd. On April 6th Keeshin called Cross with respect to a proposal that he was making to the railroads. Cross testified that he thought he had heard from Keeshin about that proposal.

On April 7th there are telephone calls from Forgash to Cross's son and Forgash in deposition admitted that those calls of U. S. Freight to Carrollton, Illinois, were made by him to Hugh Cross. I don't know whether that is Cross's son or Cross himself, but it must be Cross's son.

That telephone conversation occurred on April 7th, and on April 12th they placed their order with Cross's son in Carrollton and Carrollton is a very small town in Illinois. This boy had had a farm agency, was selling International Harvester Company farm equipment, not tractors and trailers. He did not remember ever selling

a truck or a tractor to anyone before, and this great organization in New York, one of the largest freight forwarding companies in the world, sends down to Carrollton to buy 30 tractors from a farm agency on a basis that had to assure Cross's son a profit of $150 a tractor
162 without turning a finger. He justs gets that profit automatically and he did get it. He got $4,500, which was paid to him in June, but the contract was made in April, at the time Cross started his contacts with the railroad Presidents.

Cross's first contact with a railroad President, in our view, was on April 8th with Simpson, when he went to Baltimore. He then saw Simpson again in Baltimore on April 23rd. He made his first long distance call to Simpson on April 18th, and his first long distance call to Carpi on April 18th. This was when the real conspiracy commences.

This arrangement was an arrangement that Keeshin provided for Cross in order to induce him to go out on a limb, as he did, to procure this contract for him from the railroads. There are a great many telephone conversations from U. S. Freight Lines down to Carrollton during April and May and June that must deal with this situation.

We asked Keeshin about a call that he had made on May 17th to Hugh E. Cross in Carrollton. "Oh" he said, "that had to do with my attempt to get him a tire agency." Well, he didn't succeed.

163 When I tried to get any information from Keeshin as to who he contacted at Kelly-Springfield, what were the circumstances, he had a very convenient lack of memory. Let us assume that he did not succeed, but this was another method that Keeshin used in an attempt to induce Cross to continue his work for him with the railroads, and mind you—

Mr. Meserow: That is your conclusion, now.

Mr. Freeman: That is—

Mr. Meserow: That is not in the record. That is your conclusion.

Mr. Freeman: Everything I have said is in the record.

Mr. Meserow: I think, Judge—

The Court: Well, I will examine the record.

Mr. Meserow: The record will not back up your conclusions.

The Court: I will examine the record, gentlemen.

Mr. Meserow: I am sorry. I did not mean to interrupt.

The Court: Proceed.

Mr. Freeman: Now, these thirty tractors were sold out of International Harvester's factory in Ohio, they went from Ohio to New York. they never were
164 touched by Carrollton, but the $4,500 check came to him.

It is a strange coincidence, and maybe it is only a coincidence, as Mr. Thompson says, but I think it goes beyond that and we should be given an opportunity to establish it, that when Cross bought his house in Deerfield he bought a house for thirty-eight or thirty-nine thousand two hundred dollars, but he put a deposit up of $4,500, which is a strange multiple of thirty-eight or thirty-nine thousand dollars. You put up five per cent or ten per cent with a real estate agent, but he put up forty-five, which is the exact amount that was received by his son a month prior in the tractor deal.

Now, we think that is very relevant. It is not necessary for every conspirator to know all of the circumstances of every irregular transaction. It is sufficient that in this instance two of the conspirators, Keeshin and Cross, did make arrangements for Cross to be advantaged by the executive position with Keeshin's company, by the pay-

off of $4,500, by the promise of the Kelly-Springfield
165 thing, and it is also significant that Forgash, who was an important railroad executive, participated not only in the truck deal, but also in many, many other respects.

Forgash admitted that he may have had conversations with Cross with respect to the transfer matter and let me go into this for one extra minute.

The rourt: You are going on in great detail here, Mr. Freeman.

Mr. Freeman: I shouldn't, but I—

The Court: I will examine the record here.

Mr. Freeman: All right.

The Court: Let's try to summarize it as much as we can.

Mr. Freeman: Yes. In summary, it seems very clear that the record will show the railroads did know that Cross had been promised an executive position with Keeshin and intended to go with Keeshin if he got the transfer contract. This information came to the railroads prior to the time they awarded him the contract on June 3rd.

It explains why they would award him the contract even though it was less favorable than the contract that Parmelee had offered them in writing.

166 The railroads further knew that Cross had made contacts with various railroad officials.

As a part and parcel of this undertaking Keeshin did make available to Cross's son, the same family, $4,500 in a very easy profit on the sale of thirty tractors, which was a very unusual transaction, considering that the transaction was with a New York, established company whose previous dealing had always been with the factory branch or the head of the company, down to a little farm agency in Carrollton.

Of course, the house situation tends—well, I say

"tends." It establishes beyond a doubt that Keeshin's whole purpose was that when—or rather, Cross's whole purpose was that when Keeshin got the contract he was coming to Chicago to be an executive of that Keeshin Company. He made his arrangements to come here and the Senate Investigation suspended them, because the Senate Investigation started on September 15th and the records of the house transaction show that that was when Cross too, was reluctant about going through with the house transaction and ultimately went through with it in the name of a nominee.

167 The Court: Now, what do we have left?

Mr. Thompson: If your Honor please, I just want to say, in order to expedite it, that I do not see any point in discussing the details of formalizing the transfer contract, it seems to me so obviously not part of this evidence relating to the change-over, and the details of operation, consideration of inclusion of the transfer charge and through tickets, and so forth. They don't even undertake to defend listing those things they propose to put in evidence.

The only thing I want to even mention is the evidence relating to the attendance of railroad officials at group meetings and the telephone toll slips, of course. What we say there is that none of them should be allowed to be referred to, except they have been identified with this transaction. There is a great mass of them; I don't know how high the stack is.

With respect to the matter of the attendance of these railroad officials at group meetings, they were regular meetings, held regularly. They were all officers of these different groups and they had to attend. They don't

168 even pretend to bring forward any evidence showing that the subject of this railroad transfer negotiation was ever mentioned, or was ever on the agenda or that the subject was ever discussed.

Their only defense is that they have a right to show that since these people were in a place where they could have conspired, they must have conspired. There is not any such law in this country and I hope that there never will be. That is all I have to say about that.

Mr. McConnell: All I want to say about that is, usually when you want to conspire you have to get together, and to say that we can't even get them in a meeting on your say-so that they did not conspire is a most unusual and unique argument on evidence. We can't try a conspiracy case on Mr. Thompson's say-so.

The Court: Let me ask this: I was rather interested in that in this respect: Is there anything in the depositions that indicates any meetings on the basis of the depositions that you have taken, where this came up for discussion by the officials, as a result of your discovery?

Mr. Thomas McConnell: Do you want to answer 169 that?

Mr. Freeman: Yes. I will try to answer that correctly.

The Court: Well, I do not want to tie you down, because in our discussion a number of things have gone through my mind which I will go into a little later, but I wondered if the record, as it now stands, on the basis of the depositions taken, shows or indicates that at these meetings this came up.

Mr. Freeman: You mean, that there was a discussion of the Cross matter?

The Court: Yes.

Mr. Freeman: None until November, so actually none. There was one meeting in November, 1955, either October or November, 1955, when there was a big meeting at which the Cross problem was discussed, and so on and so forth, and this was before he appeared before the Senate Committee or shortly after he appeared, but before he resigned, but the answer is that to a considerable

extent the parties said—for instance, Johnston would say, "I contacted Cross and spoke to no one about it." Gurley said, "I heard about this statement, but I didn't pass it on." In the case of the North Western there are admissions that the whole organization knew that Cross had made contact with their President and with others and that there were rumors Cross had gone beyond that and sought a job, but the answer, again, is no. There is no proof that there were meetings at which the Cross intervention was discussed.

Mr. Thompson: Not only is there no proof of that, but every President testified positively that the subject was never mentioned and never discussed.

Mr. Thomas McConnell: Well, even if that is so, as I understand what Judge Thompson is trying to do, is to get a ruling in advance that we can't even go into the question of their meetings.

Mr. Thompson: That's right.

Mr. Thomas McConnell: I understand that when we get to the trial of this case I do not have to rely just on what depositions were taken. I can put these defendants and their managing agents on the stand under the rules and cross examine them in front of the jury. I have tried conspiracy cases in this Court where I went into Court with no evidence of what happened in meetings, and after cross examination came out with a prima facie case of conspiracy. Now, I don't say that I can do it in any individual case, but at least I am entitled to the right to try.

Now, the other question is whether or not we can show formalization of a contract. I say that contract is the most cogent evidence of conspiracy I have ever seen, and certainly I can put them together.

The Court: Well, I certainly think within all of those areas that there are elements we have to consider. Is

there anything else you wanted to say?

Mr. Freeman: So that I would not be misunderstood, because I was answering your question rather restrictively—

The Court: Yes.

Mr. Freeman: (Continuing) —what Judge Thompson was referring to in the matter of meetings is not meetings at which Cross was discussed or meetings with Cross. It was meetings of various defendants for other official purposes.

172 Many of these meetings and the timing of the meetings are important in establishing when a particular conversation occurred, when they made inquiry; for instance, when Johnston made inquiry of Cross.

April 29th is very definitely the date, but it requires that we show that the American Association of Railroads met on the last Friday of every month and that Johnston was not there on March 24th and he was not there on May 27th and he was there prior to June 3rd, so he was there on April 29th and he finally said yes, it must be so, but it is that kind of problem of identifying the time when a particular conversation occurred that requires us in many instances to determine when they did meet and when they had the opportunity to pass this information on, with respect to conceded statements which they find difficult to recall as to when they occurred, or how they heard them, who they heard them from, and so on. This gives them the opportunity to refresh their recollections.

Mr. Thompson: If the mere fact that two people met together at an official meeting can be wrestled around 173 in a court room, and of course, that is admitted here, the jury has to draw the conclusion that there must be some connection or it never would have been allowed into evidence by the Court.

Now, of course, their whole argument with respect to

many of these things is a mere sequence of time ties two things together. If Cross talked to Keeshin today and Keeshin talked to Forgash today and Forgash talked to Carpi today, then they must have all been talking about the same thing, which is pure guesswork and assumption; they must all have been talking about the same thing, and therefore they must have all been in the conspiracy.

Mr. McConnell: I just want to leave this thought with you before we leave: The cases are full of it, and the Supreme Court has mentioned it time and time again, that conspiracy proof is unique. You do not have conspiracies out in the middle of the broad highway. You have got to get people together and you have to show by fact and circumstance what happened, and often times you are dealing with inferences which arise from what they did, that there must have been some sort of
174 meeting of the minds or consensus of agreement to bring about that result.

I had a case here many years ago where I had no proof at all of a conspiracy, nothing about what he is talking about, but we did have meetings and we did have inferences which were drawn from parties coming up with the same thing.

Ten years later, just by happenstance in subpoenaing in some things on another case, I found written documentary evidence of every single thing I was attempting to prove in that case, all in writing. I couldn't get it. Nobody produced it in response to any subpoenas, but the inferences were strong enough to prove to a jury that there was such a thing and there actually was.

Now, every argument that Judge Thompson makes here today was made then, that you can't infer these things; you have to have them there and you have to have a Court Reporter there taking down every word they say before you can ever prove a conspiracy. That is not the

law, it never has been the law, and if it was, you would not prove nine-tenths of the conspiracies that are alleged.

The Court: Well, here is the result of our confer-
175 ence: to me, it has been very helpful. There are certain matters I think should be gone into a little more.

I think probably the number one element is this: If you are going to file a motion for summary judgment on the contract, if that is going to be done then there may be areas here that have to be considered that you indicated at the beginning, but we will cross that hurdle when we come to it if the motion is made. As you stated this morning—

Mr. Thomas McConnell: It will be made.

The Court: (Continuing) —you contemplated making that motion within the very near future.

Mr. Thomas McConnell: Yes.

The Court: Now, if that motion is made, and the reason I bring that up is that we would first have to pass on that before I went into the various areas that we have here, and based on that premise, and I put it to you gentlemen, I would like to inquire whether or not you want me to go into the areas, and I think we should do it, where I would desire some additional information or citations of the law, but we will also consider that
176 I will extend the time for the purpose of doing it if the motion for summary judgment is made.

Now, I think the first element we do have to consider is in connection with the nature and the extent of the Interstate Commerce Commission proceedings. You made the statement at the beginning that there were only six, and all you intended to do was to refer to those matters in that they were under the control of the Interstate Commerce Commission, which is an eleven-man Commission.

Now, the thing I am thinking about since we discussed

it this morning is that we have on the face of the record certain conversations by Cross with certain officials of the different railroads who had matters that were pending before the Interstate Commerce Commission at that time, and that area is one that is limited within the scope of those proceedings, but the whole problem, and I can see the area of your argument, is that it was part of the inducement to complete this contract with Keeshin here in Chicago, but in the trial of any case of this nature
177 and of this type, we do come down, and this involves the other elements we have, to the question of how far and to what extent this should go in, if it does go in, and I can see where it possibly could be an element of inducement.

Then, however, I come up against the nature and extent of proof that the defendants would be entitled to introduce that would affect it, and I can see where we will get into another series of rounds here and that is possible in connection with a suit of this kind where you would be asking for a limitation of their proof as to what they are going to bring in and, of course, which you have to.

The factor that I think we have to analyze here, and it is addressed primarily to the defendants, is this: If I do consider this admissible, how far and to what extent and what would be the nature of what you would want to introduce in connection with it?

The next group, and in this area I think the burden rests primarily upon the plaintiff, involves the question of the admissibility of the Senate Investigating Com-
178 mittee proceedings. First, you contend that the transcript of the Senate Investigating Committee, the transcript of the hearings, after proper proof is admissible. In just a cursory examination of the authorities that have been submitted there is a question in my mind as to the admissibility of that and I would like to have

that researched rather extensively, with time for the defendants here to answer that.

Then the same applies to the report which you contend is admissible as a Government document. Now, in general proceedings there is a grave question in my mind as to whether that would be admissible, but if there are authorities then certainly I am willing to consider them. That is certainly an important element in this case.

Now, with respect to the evidence we have here, are the various depositions that have been taken on file? Have they been filed, or are they still in the possession of the respective parties?

Mr. Freeman: We have a problem there. The depositions that were taken out of town, New York, Philadelphia, and Washington, have been filed. The depo-
179 sitions that were taken of the North Western witnesses were signed and have been filed.

We have had an understanding with the other side that there would be a waiver of signatures, and as a matter of fact, when I circulated the North Western transcripts there was some question about the necessity of having them signed.

We have not proceeded to sign the railroad depositions or Keeshin's deposition or even Cross's deposition on the theory that that stipulation exists. If it does exist, and if we do have that stipulation with counsel waiving the necessity of signatures of these witnesses, we will get them all together and file them.

The Court: The reason I ask that is this: You made a number or references here and Judge Thompson made a number of references as to what was or what was not contained in the depositions that had been taken, and certainly that information, if it is available, would affect a decision on my part as to whether or not, as a part of the conspiracy, this has been shown, but on that basis I

would like, although I do not expect you to quote the
180 depostions, the parts of the depositions that may be
relevant in the consideration of that area.

Mr. Freeman: Are you talking, now, about the Interstate Commerce Commission,

The Court: No, no. I am talking now about the various transactions, for example, of the Cross family, starting with the real estate transaction, the Deerfield property and the Lasham Cartage Company.

Mr. Freeman: Yes.

The Court: Within that area I think what the record reveals is relevant to a determination as to this matter which is on the periphery of this lawsuit.

Mr. Freeman: Mr. Thompson, do we have an understanding with you waiving the necessity of signatures on these depositions?

Mr. Thompson: It has been stated several times on the record.

Mr. Freeman: Very well. Then what I propose to do is this: I would like to have that formalized, not because —I mean, I might not find these references, but we will formalize them and I will file all of the transcripts that are missing, and I know which ones they are, immediately.

181 There is one exception. Mr. Dever, who lives in Waukegan, I think should sign his, unless you waive that also. Mr. Dever is not a defendant. All of the non-defendants' have been signed and filed. The only ones that haven't been signed yet are defendant parties.

We will file all of those, and I would like to get Mr. Dever's signature, but I will go up there and get that as quickly as possible and have it notarized.

Mr. Tone: That is not necessary.

Mr. Freeman: It is not necessary?

Mr. Tone: Many of the deponents are not parties. They are employees of parties.

Mr. Freeman: But you still say it is not necessary?

Mr. Thompson: Well, we have stipulated that the depositions may be filed without signatures.

Mr. Thomas McConnell: Then that is all we need.

Mr. Thompson: It has been stated two or three times.

Mr. Freeman: I will file the exhibits. I will pre-
182 pare copies of all the exhibits that were identified at those depositions and attach them to the back sheets in one form or another and they will be filed this week so you will have a complete transcript.

The Court: Then we come down to the area of the details of formalizing the contract, all of those within this last area on which we had a general discussion here. I think from my examination that the briefs we have here adequately cover it, but I want to say this: I do not want to preclude anybody if you desire to file an additional statement on it.

I do not desire to preclude you from so doing. Then I think we come down as to the way in which this should be done. This was the Defendants' motion. I think generally throughout this whole area the Interstate Commerce Commission is the big part of yours, and then there are the others. If you want to file any additional memorandum, you may, and I think we had better cover the whole area here. You can file your supporting memorandum of your briefs here.

What I am particularly interested in, and I think
183 it is purely a legal question in my mind, is this question of the hearings before the Senate Committee. The others are additional factors. With the proceedings we have here and then with a reasonable time for you to answer and then any additional material, we should be able to conclude it. I do not want to carry it on and unduly burden anyone.

Mr. Thompson: If the Court please, we will be put in

a position, of course, of supporting the negative, in other words, negating the propriety of introducing all this evidence, and I should think that if the Plaintiff has anything to support its contention that these documents ought to be admitted, they should present their contentions first and we would answer them.

The Court: Well, I—

Mr. Thompson: I think we have said in the opening all we want to say about it. We have filed two briefs and covered it with considerable particularity.

The Court: There are areas you did not answer in the reply brief. What would you say to that? Is there any objection?

184 Mr. Thomas McConnell: There is. There is a whole section in the reply brief that we never heard of before.

The Court: That is what I say. That would then give you an opportunity to respond to that, and I think maybe that suggestion is probably better, in that I feel that the burden on this question of the hearing before the Senate Committee and that report is more on your back than on the defendants' back, and if you haven't replied to it, you may now have the opportunity. How many days do you think you would need in connection with it?

Mr. Thomas McConnell: We have already written a brief on that subject in another case. I think it is just a matter of—haven't we, Jack? Didn't we write a brief on that?

Mr. Francis McConnell: Yes, but I would just as soon as we had the time. We have several other briefs to prepare.

Mr. Thompson: If the Court please, I think Mr MrConnell will not question this: He said to the Court the first time this was called up before your Honor

185 that he contemplated filing a motion for summary judgment which would dispose of this lawsuit. That

was three months ago. I would like to see that motion for summary judgment if it is going to be filed.

Mr. Thomas McConnell: Well, I have had a few other things to do, Judge. I am in the midst of another trial.

Mr. Thompson: Well, you have been taking vacations, and so on.

Mr. Freeman: There is nothing wrong with that. I think if we had thirty days to file—we will file a motion for summary judgment promptly. We should file a brief in support of that, maybe a short time thereafter, and we will file a supplemental brief here in thirty days and Mr. Thompson can have as much time as he reasonably requires to answer that.

The Court: Then after I get those I will determine these issues and then we can go into that of the specific exhibits, because that will be a determination of some of the areas that you have on the specific documents themselves.

Are there any other questions anybody has to raise?

186 Mr. Thomas McConnell: We want to know about amendments to the complaint. We have some formal amendents, which do not amount to much, but we would like to present them and get them out of the way.

Mr. Thompson: Formal amendments to the complaint, you say?

Mr. Thomas McConnell: Yes. It is just a matter of a date to do it and advising the Court we are going to do it. It does not change the substance of anything.

Mr. Freeman: It brings it up to date and eliminates—

The Court: I have heard that before.

Mr. Thompson: Yes. I have, too. We will see what they are.

Mr. Freeman: As a matter of fact, if you will accept them here, Mr. Thompson, here are five or six copies for

your side, and I will file them with the Clerk so we get them properly filed.

The Court: Let me make this suggestion: I am continually running into this same situation. So that we have our docket clear, let them take a look at them here
187 today and then come in on a motion. Then our record will be clear on it. You are given leave to file and then at that time they can make any request they want to, and I can consider that and then we will keep the record straight on it.

Mr. Freeman: We will do that.

The Court: All right.

Mr. Freeman: Here is our motion.

Mr. Thomas McConnell: Somewhere along the line, your Honor, I think we ought to have an order concluding discovery proceedings.

The Court: Well, I think that would rightfully come after I have determined this motion.

Mr. Thomas McConnell: Yes.

The Court: Then I can consider any motion to conclude it after I have determined this area.

Mr. Moserow: Is my understanding correct, your Honor, that you intend to dispose of their summary judgment motion before you rule upon this questaion of—

The Court: If a summary judgment motion is filed. I have no motion before me. If I would determine the summary judgment motion, and if I determined it in their favor then—

188 Mr. Thompson: Then there would be an appeal.

The Court: Yes. If I determined it in your favor—

Mr. Thompson: Then they can not appeal.

Mr. Thomas McConnell: You can't appeal. You can't appeal until we get a judgment for damages.

Mr. Meserow: Is there any order being entered now?

The Court: No. You take a look at that interlocutory section.—

Mr. Thompson: I don't know. I am not so sure I am right when I say they cannot appeal.

The Court: There are some questions that are raised there that take me to 50.2 of our Practice Act. Many questions have come up under the Illinois Practice.

Mr. Thompson: Well, as I understand it, now, they will file their motion for summary judgment and brief in support, and then of course we will reply to that.

The Court: They will file within thirty days the 189 other. They may ask for an extension at that time, if you want to, and I will consider it, an extension for time to file your memorandum that we have gone over here, at the time you make your motion for summary judgment, because there is no use going over many of these areas, and I won't reach a conclusion on that until I reach it on the summary judgment, if I can keep all of this in my mind.

Thank you gentlemen for coming in.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

190 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

CERTIFICATE

I Hereby Certify that the proceedings had at a pre-trial conference in the above-entitled cause in the chambers of the Hon. Edwin A. Robson, on Monday, May 11th, 1959, were reported by me in shorthand and that the foregoing transcript consisting of pages 1 to 189, inclusive,

is a true, correct and complete transcript of my original official shorthand notes so taken as aforesaid.

/s/ Claude W. Youker, Jr.
Official Reporter,
United States District Court,
Northern District of Illinois,
Eastern Division.

664

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 56 C 323) * *

MOTION FOR LEAVE TO FILE AMENDMENTS TO COMPLAINT
(Filed May 14, 1959)

Now Comes Parmelee Transportation Company, a Delaware Corporation, plaintiff herein, by its attorneys, and moves the court for leave to file amendments to complaint instanter. A copy of said amendments to complaint is attached hereto and made a part hereof.

Lee A. Freeman
Lee A. Freeman
105 S. LaSalle Street
Chicago, Illinois
Thomas C. McConnell
Thomas C. McConnell
134 South LaSalle Street
Chicago, Illinois
John Paul Stevens
John Paul Stevens
134 South LaSalle Street
Chicago, Illinois

May 14, 1959

665

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

AMENDMENTS TO COMPLAINT

Parmelee Transportation Company, a Delaware Corporation, Plaintiff, by its attorneys, as amendments to its Complaint filed February 16, 1956, alleges:

1. Strike from the list of defendants as contained in the title of said complaint the following:

> "Western Railroad Passenger Association, Chicago Terminal Lines, an unincorporated voluntary association"

2. Amend Paragraph 12 of said Complaint to read as follows:

> "12. There are 21 railroads (including the six (6) defendant railroads) whose lines terminate in the city of Chicago. These railroads are:

666

> The Atchison, Topeka and Santa Fe Railway Company
> The Baltimore and Ohio Railway Company
> The Chesapeake and Ohio Railway Company
> Chicago and Eastern Illinois Railroad Company
> Chicago and North Western Railway Company
> Chicago, Burlington & Quincy Railroad Company
> Chicago Great Western Railway Company
> Chicago, Indianapolis and Louisville Railway Company
> Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Chicago North Shore and Milwaukee Railway
Chicago, Rock Island and Pacific Railroad Company
Chicago, South Shore and South Bend Railroad
Erie Railroad Company
Grand Trunk Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company
The New York Central Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Wabash Railroad Company

667 There are three depot corporations in the city of Chicago, namely:

The Baltimore and Ohio Chicago Terminal Railroad Company
The Chicago and Western Indiana Railroad Company
The Chicago Union Station Company

(The 21 railroads terminating in Chicago and the 3 depot companies will hereinafter be referred to as 'Chicago Terminal Lines'.)"

3. Amend the first line of Paragraph 23 to read as follows:

"On or about February 9, 1951, the Chicago Terminal Lines"

4. Amend lines 9 and 10 of Paragraph 32 to read as follows:

"Johnston, Gurley and others, and through them the defendant railroads and the Chicago Terminal Lines to join"

5. Amend Paragraph 33 (d) to strike therefrom the phrase "by the Railroad Association" in the 14th and 15th lines thereof.

6. Amend Paragraph 33 (h) to read as follows:

"(h) On or about September 29, 1955 Transfer qualified to do business in Illinois."

7. Amend Paragraph 34 (f) to read as follows:

"(f) Unlawful restraints have been imposed upon plaintiff in connection with the business of transporting non-coupon holding passengers from and between railroad terminal stations, and of performing the pick-up and delivery of baggage and other services;"

668 8. Amend paragraph 34 (g) to read as follows:

"(g) The Chicago Terminal Lines and the defendant railroads in furtherance of said combination and conspiracy, have wrongfully impaired the reputation of plaintiff with the public for satisfactory passenger and baggage transfer services;"

9. Strike paragraph 34 (h) from said complaint and substitute therefor the following:

"(h) The passenger and baggage transfer business and services previously rendered by plaintiff have been destroyed and plaintiff has been forced to abandon and cease performing said business and services."

Lee A. Freeman
Lee A. Freeman
105 S. LaSalle Street
Chicago, Illinois
Thomas C. McConnell
Thomas C. McConnell
134 S. LaSalle Street
Chicago, Illinois
John Paul Stevens
John Paul Stevens
134 S. LaSalle Street
Chicago, Illinois
Attorneys for Plaintiff,
Parmelee Transportation Company

May 14, 1959

669

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

ORDER

This Cause Coming On To Be Heard on motion of Plaintiff for leave to file Amendments to Complaint, notice having been served to all parties of record, and the court being fully advised in the premises;

It Is Ordered that leave be and is hereby given to Plaintiff to file its Amendments to Complaint instanter.

It Is Further Ordered that the defendants be and are hereby given 20 days from the date hereof in which to answer or otherwise plead.

Enter:
Edwin A. Robson
Judge

May 14, 1959

671

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

ANSWER OF DEFENDANT RAILROAD PRESIDENTS AND CERTAIN OF DEFENDANT RAILROADS TO COMPLAINT AS AMENDED.

(Filed May 14, 1959)

Howard E. Simpson, Paul E. Feucht, Wayne A. Johnston and Fred G. Gurley, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago and North Western Railway Company, Illinois Central Railroad Company and The Pennsylvania Railroad Company, defendants, by Floyd E. Thompson and Philip W. Tone, their attorneys, for answer to the complaint as amended restate the admissions, denials and averments of their answer to the original complaint, except as follows:

1. They admit the allegations of paragraph 12 of the complaint as amended.

2. Without limiting the general denial of the allegations, and each of them, of paragraph 34, they deny specifically the allegations of subparagraph (h) of para-
672 graph 34, as amended.

Floyd E. Thompson
Philip W. Tone
Attorneys for Said Defendant

673

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

ANSWER OF DEFENDANTS JOHN L. KEESHIN AND RAILROAD TRANSFER SERVICE, INC. TO THE AMENDMENTS TO THE COMPLAINT HEREIN.

(Filed May 25, 1959)

Now comes John L. Keeshin and Railroad Transfer Service, Inc., defendants, by their attorney, Albert J. Meserow, to answer the amendments to the complaint, heretofore filed by plaintiff herein, and for answering states as follows:

1. that these defendants hereby restate their denials, averments, and admissions of their answer, to the original complaint herein;

2. that as to the amendments to paragraphs 12, 23, 32, and 33 (d), these defendants neither admit nor deny the allegations therein contained, but demand strict proof thereof.

3. These defendants admit the allegations to the amendment to paragraph 33 (h).

674 4. These defendants deny the allegations of the amendments to paragraphs 34 (f), 34 (g), and 34 (h).

Albert J. Meserow
Albert J. Meserow
Attorney for said defendants

675

In The United States District Court

* * (Caption—No. 56 C 323) * *

ANSWER OF DEFENDANT, THE NEW YORK CENTRAL RAILROAD COMPANY, TO CERTAIN AMENDMENTS TO THE COMPLAINT.

(Filed June 3, 1959)

Now comes The New York Central Railroad Company, one of the defendants, by Marvin A. Jersild and Charles I. Hopkins, Jr., its attorneys, and in answer to the amendments of May 14, 1959 to the complaint, restates and incorporates herein by reference, the admissions, denials and allegations of its answer to the original complaint, and further says:

1. It admits the allegations of amended paragraph 12.

2. This defendant restates and realleges its denial of each and every allegation of paragraph 34 and further denies each and every allegation of amended sub-paragraph (h) of paragraph 34.

Marvin A. Jersild
Charles I. Hopkins, Jr.
Marvin A. Jersild
Charles I. Hopkins, Jr.
Attorneys for Defendant,
The New York Central
Railroad Company
Suite 1236 LaSalle Street Station
Chicago 5, Illinois
WAbash 2-4200

676 State of Illinois,
County of Cook—ss.

I, Jo-Anne Zimmer, being first duly sworn, depose and say that I mailed a true and correct copy of the foregoing Answer of Defendant, The New York Central Railroad Company, to Certain Amendments to the Complaint, postage prepaid, to Messrs. Floyd E. Thompson and Albert E. Jenner, Jr. and Philip W. Tone, 135 South LaSalle Street, Chicago 3, Illinois, Messrs. Lee A. Freeman and John Paul Stevens, 105 South LaSalle Street, Chicago, Illinois, Mr. Thomas C. McConnell, 135 South LaSalle Street, Chicago 3, Illinois, Mr. Charles F. Hough, 135 South LaSalle Street, Chicago 3, Illinois and Mr. Albert J. Meserow, 231 South LaSalle Street, Chicago 4, Illinois, by depositing same, addressed as above and sealed in a regular United States mail box located in the LaSalle Street Station, Chicago, Illinois, this 3rd day of June, 1959.

Jo-Anne Zimmer

Subscribed and Sworn to before me
this 3rd day of June, 1959.
Robert G. Courtney
Notary Public
(Seal)

677

In The United States District Court

* * (Caption—No. 56 C 323) * *

Comes the plaintiff by counsel and presents its motions for partial summary judgment and it is

Ordered that leave be and hereby is given to the plaintiff to file said motion instanter and to the defendants to file instanter opposition thereto, and said motion of the plaintiff for partial summary judgment is entered and is hereby taken under advisement by the Court on the briefs

of counsel, supporting brief to be filed within 30 days herefrom, answering brief within 30 days thereafter and reply brief within 20 days thereafter, and it is

Further Ordered that the time for the plaintiff to file a supplemental brief be and it hereby is extended 30 days herefrom and that reply thereto be filed within 30 days thereafter.

678

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

MOTION FOR PARTIAL SUMMARY JUDGMENT
(Filed June 10, 1959)

Now comes plaintiff, Parmelee Transportation Company, by Thomas C. McConnell, Lee A. Freeman and John P. Stevens, its attorneys of record herein, and moves the Court for the entry of a summary judgment interlocutory in character on the issue of liability by reason of a five-year contract illegal under the Federal Antitrust Laws, and, in support of said motion, says:

1. That the Federal Rules of Civil Procedure provide by Rule 56(c) thereof that, "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

2. That it is alleged in the complaint herein, and not denied by any answer thereto, that "There are eight
679 railroad stations in the City of Chicago at which persons board or disembark from trains engaged in interstate passenger transportation. The connecting railroads involved in such interstate trips through Chicago in most instances do not operate into the same terminal station in said city. A large number of the persons making interstate railroad trips which carry them through

Chicago must disembark from a train at one of said eight railroad stations and travel to another station some two blocks to two miles distant in order to board another train. The transportation and transfer of such passengers and their baggage from and between railroad stations in Chicago is hereinafter referred to as 'station transfer service'." (Paragraph 14 of the complaint and answers thereto)

3. That it is alleged in the complaint herein, and not denied by any answer thereto, that "In addition, each day large numbers of persons making interstate railroad trips arrange for the pick up of their trunks and other baggage at points within the Chicago metropolitan area for transport to outgoing railroad stations where they are checked through to destinations; and conversely a large number of such persons arrange for the delivery of such trunks and other baggage after interstate railroad trips, from incoming railroad stations to points of 680 destination within the Chicago metropolitan area. These services will hereinafter be referred to as 'pick-up and delivery service'." (Paragraph 15 of the complaint and answers thereto)

4. That it is alleged in the complaint herein, and not denied by any answer thereto, that "The business of transporting such passengers and their baggage from and between stations in Chicago and of providing pick-up and delivery service is part of the trade or commerce among the several states protected by §§ 1 and 2 of the Sherman Act." (Paragraph 16 of the complaint and the answers thereto)

5. That it is alleged in the complaint herein, and not denied by any answer thereto, that "A passenger making an interstate railroad trip through Chicago customarily contracts with one railroad for a single joint fare to cover the entire trip, including the cost of transporting the

passenger and his baggage in Chicago from the incoming train to the outgoing train. Railroad tickets issued for such trips through Chicago include transfer coupons for station transfer service. For over one hundred years the defendant railroads and their predecessors have paid other persons to perform this station transfer service for them." (Paragraph 17 of the complaint and the answers thereto)

681 6. That it is alleged in the complaint herein, and not denied by any answer thereto, that "Prior to June 1, 1955, any person willing and able to perform this station transfer service was free to negotiate with the railroads for this business, and the railroads were free to contract with the person or persons who offered to provide satisfactory station transfer service at the lowest cost." (Paragraph 18 of the complaint and the answers thereto)

7. That it is alleged in the complaint herein, and not in any material respect denied by any answer thereto, that "Extensive station transfer and pick-up and delivery services were operated by plaintiff in Chicago. Such services were originally established by Frank Parmelee in 1853. Prior to September 30, 1955, each of the Chicago Terminal Lines engaged plaintiff or its predecessors and others to perform station transfer services. In an effort at all times to provide adequate service at the lowest cost, and thus to offer the railroads and the traveling public a better bargain than its competitors or potential competitors could offer, the plaintiff and its predecessors designed and acquired special vehicles, buildings and other facilities, built special structures at depots, hired and trained personnel in specialized skills, and from time to time invested substantial sums of money in order to

682 maintain and improve the character of plaintiff's operations, all for the purpose of meeting the special

requirements of the Chicago Terminal Lines, including the defendant railroads, and of the traveling public. Throughout this period of over 100 years, the plaintiff and its predecessors engaged in this business, and provided the railroads and the traveling public with dependable service. Plaintiff is ready, willing and able, and has offered to continue to engage in the station transfer and pick-up and delivery business on terms and conditions favorable to the railroads and to the traveling public, * * *." (Paragraph 20 of the complaint and the answers thereto)

8. That it is alleged in the complaint herein, and not denied by any answer thereto, that "On or about September 15, 1955, acting for and on behalf of the Chicago Terminal Lines, Earl B. Padrick, as their agent, executed a contract dated as of October 1, 1955, granting Transfer [Railroad Transfer Service, Inc.] the exclusive privilege of transporting passengers and baggage between stations and of performing the pick-up and delivery service in Chicago for a fixed term ending September 30, 1960 * * *." (Paragraph 33 (f) of the complaint and the answers thereto)

9. That a true and correct copy of the aforementioned exclusive contract, executed on September 15, 1955,
683 dated as of October 1, 1955, with Railroad Transfer Service, Inc., is attached hereto as Exhibit A and made a part of this motion.

10. That by said agreement of September 15, 1955, the Chicago Terminal Lines, including defendant railroads, agreed that it was their collective purpose and intention to the maximum extent possible to limit the entire field of passenger and baggage transportation between railroad terminal stations and between railroad terminal stations and steamer docks in Chicago exclusively to Transfer, and to act in concert to recommend and refer all their passengers and prospective passengers to Transfer, as the sole

and exclusive baggage transport service which could be relied upon for prompt, safe, satisfactory and economical baggage transfer service in the Chicago terminal area.

11. That it appears from the terms of the aforementioned contract that a substantial segment of interstate commerce has been monopolized, and that the plaintiff company, as a competitor, has been excluded from competing for said transfer business by virtue of the restraints imposed upon plaintiff's competition by the aforesaid agreement, and that, therefore, said agreement is illegal under the applicable sections as pleaded in the plaintiff's complaint.

684 12. That under Paragraph (D) of the prayer for relief in plaintiff's complaint, the following relief is requested: that "Said contract entered into on September 15, 1955 be declared to be illegal and of no force and effect;" that for the reasons set forth in this motion and on the admitted facts disclosed herein, plaintiff is entitled to a summary judgment declaring, pursuant to such prayer for relief, that the aforesaid contract and agreement is "illegal and of no force and effect."

Thomas C. McConnell
Lee A. Freeman
John P. Stevens
Attorneys for Plaintiff
Parmelee Transportation Company

Dated: June 10, 1959

706

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

OPPOSITION TO PLAINTIFF'S MOTIONS OF JUNE 10, 1959

(Filed June 10, 1959)

May It Please The Court:

Defendants, Howard E. Simpson, Paul E. Feucht, Wayne A. Johnston, Fred G. Gurley, The Atchison, Topeka and Santa Fe Railway Company, Baltimore and Ohio Railroad Company, Chicago and Northwestern Railway Company, Illinois Central Railroad and The Pennsylvania Railroad Company, oppose the motions of plaintiff for fixing extended times for filing briefs in support of its motion for summary judgment and any supplement of its brief in opposition to defendants' motion to exclude certain categories of evidence, and in support of their opposition say:

1. This case has been at issue since October, 1956.

707 The motion for partial summary judgment is based on the answers of defendants and could have been filed two and one-half years ago as well as at this late date. At the time of the progress call on December 15, 1958, plaintiff's attorneys announced that they proposed to file a motion for partial summary judgment. On March 18, 1959, when defendants moved that this case be set for pre-trial conference, plaintiff's attorneys again announced that they proposed to file a motion for partial summary judgment. On May 11, 1959, when the pretrial conference concluded, plaintiff's attorneys announced that the motion for partial summary judgment would be filed promptly and they were given 30 days in which to file a supporting brief. Plaintiff's attorneys offer no justification for the unconscionable delay in filing the motion for partial summary judgment and a supporting brief.

2. At the conclusion of the pre-trial conference, plaintiff's attorneys were granted 30 days to file a supplemental brief in opposition to defendants' motion to exclude certain categories of evidence. Without excusing the failure to file a supplemental brief in the alloted time and without justifying the enlargement of time requested, plaintiff's attorneys now ask to have the time for filing this supplemental brief enlarged to August 3, 1959, and give no assurance that this date will be respected any more than earlier fixed dates. Granting this extraordinary enlargement of
708 time will necessarily delay the disposition of the pending motions of defendants and consequently the preparation for trial of this case.

3. The Chicago Transfer contract, the validity of which is challenged by this suit, is for the period October 1, 1955, through September 30, 1960. It is vital to the interests of defendants that this suit be tried and the issues determined before April 1, 1960, so that the defendant railroads will have ample opportunity to negotiate a contract for the continuation of the transfer services well in advance of the time of the termination of the present contract. Plaintiff's course of conduct for the past six months has been calculated to delay the disposition of matters preliminary to trial and consequently the setting of an earlier trial date.

WHEREFORE, defendants move that all matters preliminary to trial and all briefs respecting such matters be presented so that disposition can be made of all pre-trial motions at the opening of court in September, 1959, and that this case be set for trial at the earliest convenience of the Court in late 1959 or early 1960.

/s/ Floyd E. Thompson
/s/ Philip W. Tone
Attorneys for Defendants.

Thompson, Raymond, Mayer,
Jenner & Bloomstein
135 South La Salle Street
Chicago 3, Illinois
RA 6-0220

709

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

AFFIDAVIT OF E. B. PADRICK FILED BY DEFENDANT RAILROADS AND RAILROAD PRESIDENTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

(Filed June 30, 1959)

Floyd E. Thompson
Philip W. Tone,
Attorneys for defendant
Railroad Presidents and
Certain defendant Railroads.

Thompson, Raymond, Mayer,
Jenner & Bloomstein
135 South LaSalle Street
Chicago 3, Illinois

Marvin A. Jersild
Charles I. Hopkins, Jr.,
Attorneys for defendant
New York Central Railroad
Company.

CERTIFICATE

Philip W. Tone certifies that he has served by first class mail on each of the attorneys of record for plaintiff and for the other defendants a copy of the Affidavit of E. B. Padrick, this 30th day of June, 1959.

Philip W. Tone,
Philip W. Tone,

One of the attorneys for defendant
Railroad Presidents and Certain
defendant Railroads.

710

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

AFFIDAVIT OF E. B. PADRICK

State of Illinois }
Cook County } ss.

E. B. Padrick, being first duly sworn, on oath states:

1. Affiant is Chairman of the Trans-Continental and Western Passenger Associations, with offices located in the Union Station Building at 516 West Jackson Boulevard, Chicago 6, Illinois. These associations include all of the Class I railroads operating passenger service in the 24 Western states. A Class I railroad is one having $3,000,000 gross annual operating revenues. He is also Chairman of several additional allied bureaus and agencies, such as the Rail Travel Promotion Agency, Rail Travel Credit Agency, General Folder Distributing Agency, Western Railroads Military Bureau. He has also acted as Chairman of the Chicago Terminal Lines Committee during this period. His railroad experience started July 15, 1920, in the Passenger Department of the Union Pacific Railroad in Omaha, Nebraska, and he held various positions in that department with that railroad until July 15, 1937, at which time he accepted the position of Chief of Tariff Bureau of the Western Passenger Association, which position he held
711 until July 1, 1938, being then promoted to the position of Assistant to the Chairman. On June 1, 1944, he was elected Vice Chairman, and on July 15, 1948, he was elected Chairman. Affiant is thoroughly familiar with the through railroad passenger transportation service carried

on through the Chicago junction point by the 21 railroads having passenger terminals in the Loop area of Chicago. Affiant is also familiar with the nature and characteristics of passenger transportation by railroads in the United States. The matters stated in this affidavit were true during 1955 and prior thereto and are also true today, unless the context indicates otherwise. A part of his duties for more than the past 10 years has been supervising the arrangements for the transfer of passengers and their baggage between railway stations in Chicago, and he is familiar with the problems involved in it.

2. The subject 21 railroads operate passenger transportation service to and from more than 50,000 points in the United States, either over their own lines or via connecting carriers. These 21 railroads (hereinafter "the railroads") use eight terminals located in or closely adjacent to the Loop area of Chicago. The railroads and the terminals used by each are:

DEARBORN STATION (Dearborn and Polk Streets)
The Atchison, Topeka and Santa Fe Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago and Western Indiana Railroad Company
Erie Railroad Company
Grand Trunk Western Railroad Company
Monon Railroad
Wabash Railroad Company

GRAND CENTRAL STATION (Harrison and Wells Streets)
The Baltimore & Ohio Railroad Company
The Chesapeake and Ohio Railway Company
Minneapolis, St. Paul & Sault Ste Marie Railroad Company

712 UNION STATION (Canal and Adams Streets)
Chicago, Burlington & Quincy Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Gulf, Mobile and Ohio Railroad Company
The Pennsylvania Railroad Company
CENTRAL STATION (Michigan Avenue at Eleventh Place)
Illinois Central Railroad Company
The New York Central Railroad Company
LA SALLE STREET STATION (La Salle and Van Buren Streets)
Chicago, Rock Island and Pacific Railroad Company
The New York Central Railroad Company
The New York, Chicago and St. Louis Railroad Company
C&NW PASSENGER TERMINAL (Madison, Canal and Clinton Streets)
Chicago and North Western Railway Company
NORTH SHORE STATION (South Wabash Avenue)
Chicago North Shore & Milwaukee Railway
SOUTH SHORE STATION (Randolph Street and Michigan Avenue)
Chicago South Shore and South Bend Railroad

3. All regularly scheduled trains of said railroads terminate in Chicago and none passes through Chicago. It is therefore necessary that passengers whose rail journeys begin and end at points outside of Chicago transfer from one train to another in Chicago.

4. Many of these through passengers (herein "transfer passengers") move through Chicago from incoming to outgoing carriers having different station terminals. In 1955 approximately 3,900 transfer passengers a day passed through Chicago. Approximately 99% of these were traveling between origin and destination points located in different states. Because of the location of the eight Chicago passenger terminals, the only practical method of providing for the transfer of these passengers from the
713 arriving terminal to the departing terminal is by means of motor vehicle, equipped to carry such pas-

sengers and their accompanying hand baggage simultaneously.

5. Each transfer passenger is issued a railroad ticket composed of a series of coupons, purchased at the passenger's point of origin and covering his complete transportation to his destination, including a transfer coupon entitling the passenger to transfer between stations. The passenger makes a single payment to the origin carrier for this ticket. No charge is made for the transfer coupon, except in the area less than 82 miles from Chicago, the transfer cost being absorbed by the outgoing railroad which pays the transfer agent for the service in accordance with transfer coupons collected by the agent or marked to indicate that baggage has been checked through.

6. Transfer passengers are permitted to check through their baggage from the point of origin to the point of destination. The transfer of this baggage between stations in Chicago has always been performed by the transfer agent as part of the service rendered by the agent to the Chicago terminal lines. This checked baggage has always been transferred in motor trucks separate from the vehicles in which the passengers and their hand baggage are transferred. The transfer agent is entitled to collect on the transfer coupon whether it transfers only the passenger, only his baggage, or both passenger and baggage. When baggage is accepted for checking through, the initial carrier stamps the transfer coupon with an appropriate abbreviation or punches that coupon to indicate the fact that baggage has been checked through. When the transfer coupon has been appropriately stamped or punched to indicate that baggage has been checked through and the passenger does not utilize the transfer service and
714 therefore does not surrender the coupon to the transfer agent, the outgoing railroad takes the coupon from the passenger and periodically reports to the transfer

agent the number of coupons so received by it and pays them.

7. Transportation for a through passenger is sold over routes designated by the ticket, the routing being chosen by the passenger from among available alternatives. Normally, the through passenger desires to accomplish his journey with the time between incoming and outgoing trains in Chicago reduced to a minimum, and through transportation is usually designed to route the transfer passenger from Chicago to his destination via the first train scheduled to depart from Chicago after his incoming train is scheduled to arrive. Moreover, in many instances, the passenger must transfer at one or more other junction points after leaving Chicago, and these subsequent transfers are also calculated to delay the transfer passenger for the minimum amount of time at the subsequent junction point.

8. For many years prior to October 1, 1955, the transfer of transfer passengers and their baggage between stations in Chicago was performed by Parmelee Transportation Company, plaintiff in this action, pursuant to exclusive arrangements made with Parmelee by the railroads acting in concert. All transfer of passengers and their baggage was performed by Parmelee pursuant to these arrangements, except for certain movements of special groups traveling at specially reduced fares.

9. In addition to the transfer of through passengers and their hand baggage in passenger motor vehicles, Parmelee also performed the following services for the railroads: (a) transfer of checked baggage between stations by truck; (b) transfer of corpses between stations; (c) transfer of invalids; (d) delivery of time tables to
715 hotels, etc.; and newspaper shipments; and (e) transport passengers from stations to downtown hotels.

10. In addition Parmelee performed the service of pick-

ing up and delivering from the homes of travelers in the Chicago area to designated railroad stations trunks and baggage to be shipped or checked through by rail, and also the service of delivering to the homes of Chicago travelers baggage arriving with them, pursuant to separate contracts with each passenger, and transported passengers between stations for cash fares.

11. The arrangements between Parmelee and the railroads, acting in concert, were contracts, partly oral and partly written, to which Parmelee, and all the railroads (with the exception of the Nickel Plate, which entered into a separate written contract with Parmelee having substantially the same terms as the contract with the other railroads) were parties. The terms of these contracts and the amendments thereto were negotiated, fixed and determined at joint meetings attended by representatives of all the railroads and representatives of Parmelee, and by communications between a representative of all the railroads, usually affiant, and a representative of Parmelee. Throughout this period Parmelee dealt with and contracted with all of the 21 Chicago terminal railroads as a group, acting in concert, and Parmelee's contract was exclusive.

12. In 1954 the terminal railroads determined to ascertain whether there were other persons or firms who were willing to perform the service which had theretofore been performed exclusively by Parmelee. Through a committee, consisting of the six railroads who are defendants in this action, the terminal lines communicated with various 716 firms with a view to interesting them in performing the transfer service. The committee's negotiations with these various firms resulted in the receipt of proposals from John L. Keeshin and Willett Motor Coach Company. A proposal was then obtained from Parmelee, in which Parmelee proposed that the railroads enter into an exclusive contract with it for a period of 6½ years. After

negotiations between the committee and the three bidders, respectively, and finally between the Committee and Parmelee and Keeshin, respectively, Keeshin was awarded the contract for a five year period in a meeting of representatives of all the terminal lines on June 13, 1955. A formal written contract was executed between the lines and Railroad Transfer Service, Inc., a corporation organized by Keeshin, and the service commenced under this contract on October 1, 1955, and continues.

13. The service performed by Railroad Transfer Service, Inc., is substantially the same as the service performed by Parmelee, except that Railroad Transfer does not carry passengers between stations for cash fares and does not transport passengers from stations to downtown hotels, and except that Railroad Transfer's equipment and service are superior to Parmelee's.

14. In order to provide a satisfactory through service for transfer passengers, the railroads are required to make arrangements which will assure the movement of transfer passengers between Chicago stations without delay. If the transfer service provided by the railroads is not available to the passenger immediately upon his disembarking from an incoming train, the passenger is subjected to the inconvenience of either waiting until such service is available or to the inconvenience and expense of having to
717 arrange for his own transportation. A transfer passenger who misses his connecting train by reason of inadequate transfer service is required to maintain himself in Chicago until the time the next available outgoing train departs.

15. At many times, and especially during inclement weather, there are an insufficient number of taxicabs available at a station to promptly and adequately transfer passengers from that station to another station.

16. The time available for the transfer of passengers

and baggage between stations in Chicago is limited by the time interval between the scheduled or actual arrival time of the incoming train on which the transfer passenger arrives and the scheduled or actual departure time of the outgoing train on which that passenger departs in the continuation of his through transportation. In many instances this time interval is so short that a delay of a few minutes in the departure of the transfer vehicle from the arriving station or enroute to the designated departure station or in the unloading of the passengers and their hand baggage at the departure station could cause the transfer passengers or their hand baggage to miss the outgoing train on which they were scheduled to depart. If the transfer passenger were unable to depart on the scheduled outgoing train, he would be required to wait until the next available outgoing train, either over the same or another terminal line and would thereby be seriously inconvenienced. The delay would often disrupt the schedule of connections at various points between Chicago and the passenger's ultimate destination, and it would often render it impossible for the passenger to obtain the desired type of railroad car accommodations, which are often reserved in advance, which accommodations might not be avail-
718 able on the later outbound train which the passenger would be required to take. Such a delay would often seriously interfere with the purpose of the passenger's journey, by causing loss or interference with a business opportunity, by causing the passenger to miss business appointments, an opportunity to see friends and relatives or resulting in other similar consequences.

17. The railroad's through transportation is competitive in many instances with other forms of transportation, and unsatisfactory transfer facilities between stations would result in a loss of good will toward the railroads and could result in the diversion of its passenger traffic to other forms of transportation.

18. The maintenance of prompt and effective transfer service is necessary to permit the railroads to operate efficiently. The car make-up of inbound and outbound trains is planned to accommodate the normal volume of traffic moving by each train which the railroads' experience has taught them to anticipate. In the absence of a regular and reliable transfer service bringing passengers from connecting trains, the outgoing railroad would be unable to accurately predict the necessary car make-up of outbound trains, would incur the expense of operating equipment on scheduled trains for which anticipated passengers were not available, and would be unable to assure adequate equipment to take care of passengers who had missed their scheduled connections by reason of inefficient transfer service. In addition, the railroads would be put to the expense, through the necessary rerouting of passengers, of rewriting tickets and arranging for accommodations on the later train substituted for the originally scheduled outgoing train.

19. It is therefore necessary for the railroads to provide a transfer service seven days a week maintained
719 in accordance with the incoming and outgoing train time schedules during the 24 hours a day time schedule.

20. The transfer agent employed by the railroads is required to meet all trains with sufficient vehicles to insure the prompt and efficient transfer of transfer passengers from that train to the connecting outgoing trains. The agent has always maintained a booth or desk in each station and personnel whose duty it is to guide passengers disembarking from incoming trains to the transfer vehicles by which they will be transferred to the outgoing station. This service minimizes the loss of time and confusion which would be present with passengers unfamiliar with the Chicago stations.

21. The aforesaid considerations make it highly de-

sirable to the railroads and their passengers, if not absolutely essential for efficient service, that one transfer agent perform the transfer service for all railroads. The exclusive arrangement now in effect has been employed for about 100 years and no other arrangement has been deemed practicable for the Chicago terminal lines or the transfer agent or the passengers. Any other arrangement would result in confusion and delay.

720 *E. B. Padrick*
E. B. Padrick

Subscribed and sworn to before me by the said E. B. Padrick this 25th day of June, 1959.

F. J. Stanton
Notary Public, Cook County, Illinois
My Commission expires Jan. 27, 1962

(SEAL)

721

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

AFFIDAVITS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed August 12, 1959)

State of Illinois }
County of Cook } ss.

Edward Bayr, being first duly sworn, upon oath deposes and says as follows:

1. Affiant is General Manager of Railroad Transfer Service, Inc.

2. There are six railroad stations used by defendant terminal railroads in Chicago, Illinois and are known respectively as the Illinois Central Station, the Polk Street Station, the New York Central Station, the Grand Central Station, the Union Station and the Northwestern Station.

3. At all of the stations, except the Illinois Central and Polk Street, the parking facilities for the vehicles used by Railroad Transfer Service in the performance of its transfer operation for said terminal railroads are located upon the private property of the respective owners of said stations in locations convenient for passengers and where they may be readily seen. The respective parking facilities used by Railroad Transfer Service are at the same sites as those used by Parmelee Transportation prior to the time Railroad Transfer Service began the transfer operations in question. The areas so used are specially designed for the use of said transfer vehicles, limited
722 in size, and will accommodate the following number of the vehicles of Railroad Transfer Service:

(a) Northwestern Station—6 vehicles.
(b) Union Station—10 vehicles.
(c) Grand Central Station—6 vehicles.
(d) New York Central Station—6 vehicles.

In order to conduct an efficient operation and meet the demands for the transfer of passengers at various times each day when the number of passengers is large, the special areas at each of said stations are occupied to capacity by the vehicles of Railroad Transfer Service and when one of its vehicles is loaded and is driven away another of its vehicles which has been kept waiting on the public street near the station is then driven immediately into the loading area to occupy the space of the vehicle that has departed, thus again resulting in the loaded area being occupied to capacity.

4. The loading area for passengers transferred by Railroad Transfer Service to and from the Illinois Central is opposite the main station doors and is likewise conveniently located for passengers who are able to readily find said vehicles upon leaving the station. The site is near the

main door of the station and is located upon land in the possession of the Illinois Central Railroad. Such site has a capacity for six of the vehicles of Railroad Transfer Service and was used by Parmelee Transportation
723 Company prior to the time Railroad Transfer Service began the transfer operation in question. The loading area has a capacity for six of the vehicles of Railroad Transfer Service and the same procedure is followed when the number of passengers is large with regard to vehicles being driven from the street where they have been waiting as described in Par. 5 hereof and for the same reasons.

5. The loading area for passengers transferred by Railroad Transfer Service to and from the Polk Street Station is in a public street known as Plymouth Court and is opposite the east doors of said station in the same site used by Parmelee Transportation Company prior to the time Railroad Transfer Service began the transfer operation in question. It is likewise conveniently located for passengers leaving said station.

6. Railroad Transfer Service employs women known as stewardesses and men known as passenger agents who wear uniforms when on duty. It maintains booths in each of said stations at which the stewardesses and passenger agents discharge their duties. The booths are located where they may be readily seen by passengers leaving trains. The procedure followed by a passenger leaving a train and desiring to be transferred to another station by Railroad Transfer Service's operation is to present his railroad ticket to the uniformed stewardess or passenger agent who detaches and keeps the coupon which entitled the passenger to the transfer service. The stewardess
724 or passenger agent gives the passenger a new coupon or ticket and directs the passenger where to go to find Railroad Transfer Service's vehicle. The passenger then goes to the area in the station where said vehicles

are located as previously described, gives the coupon or ticket to the driver and is then driven to the other station.

7. The railroad coupon which is detached by the stewardess or passenger agent does not carry the name of the station to which the passenger is to be transferred nor does it give the time of departure of the train which will bring him to his destination. Consequently, most passengers who are strangers in Chicago do not know the name of the station or its location or the approximate time required to travel between stations and many do not know or forget or become confused as to the time of departure of the trains which will take them to their destinations without such information which is given them by the stewardesses or passenger agents of Railroad Transfer Service.

8. Railroad Transfer Service began the transfer of passengers under its contract with the terminal railroads on October 1, 1955. Beginning at that time and continuing to on or about September 1, 1956, Parmelee Transportation Company continued to send the same or similar vehicles to the aforesaid six stations as it did previously when
725 it performed the transfer operation for the terminal railroads. It caused the vehicles to be parked in streets near the stations and caused its drivers or passenger agents to enter the stations. They wore uniforms of the same or similar kind as they had worn when Parmelee Transportation Company had performed the transfer operation for the terminal railroads. Thus passengers coming out of the train sheds would frequently be confronted at the same time with the drivers or agents of Parmelee Transportation Company and the stewardesses and passenger agents of Railroad Transfer Service, all wearing uniforms and all soliciting the passengers to transfer them to the stations where they were to board the trains for their destinations. In the course of his duties as General Manager of Railroad Transfer Service, affiant went to the

six stations upon numerous occasions during the period from October 1, 1955 to on or about September 1, 1956 and saw and heard the drivers or agents of Parmelee Transportation Company accost passengers in the stations when coming out of the train sheds and saw and heard numerous arguments in the stations between said employees of Parmelee Transportation Company and the stewardesses or passenger agents of Railroad Transfer Service in the presence of the passengers as to which would transfer them to the respective stations to which they were to go. These arguments were frequently carried on by employees of Parmelee Transportation
726 Company in loud tones of voice and caused the passengers to become confused and would interrupt or make it difficult for the stewardesses or passenger agents of Railroad Transfer Service to detach the transfer coupons from the tickets of the passengers, arrange for the transfer of their baggage and give them necessary information such as when their trains were to depart.

/s/ Edward D. Bayr

Subscribed and sworn to
before me this 11th day
of August, 1959.

A. Kazanow
Notary Public
(SEAL)

727

State of Illinois }
County of Cook } ss.

Aaron Kazanow, being first duly sworn, upon oath deposes and says as follows:

1. Affiant has been the treasurer of Railroad Transfer Service, Inc. since it was incorporated.

2. Prior to the time defendant J. L. Keeshin made an offer to defendant terminal railroads which resulted in the contract in question between J. L. Keeshin and the terminal railroads, affiant made a survey for J. L. Keeshin in order to equip him to make the offer which resulted in said contract.

3. As a result of said survey, affiant reached the following conclusions which he submitted to J. L. Keeshin:

(a) The cost of leasing a suitable radio dispatch system was less expensive and more satisfactory than to purchase it but the minimum period for which a suitable lease could be made was for a period of five years.

(b) A garage building would be needed for the storage and maintenance of the vehicles to be used in the transfer operation which would be reasonably close to the area in which the five railroad stations were located but no adequate building with such a location could be leased for less than a term of five years.

728 (c) The useful life of the vehicles required to transfer passengers would be approximately thirty months.

(d) The useful life of the tractors required to have trailers for the baggage of passengers would be approximately five years.

(e) The contract with the union representing the drivers of the vehicles used in the transfer operation would be for a minimum term of three years.

(f) In order to obtain a reasonable insurance premium rate covering the equipment and its operation, the insurance contracts would have to be for a minimum term of five years.

(g) The cost of all equipment needed in order to operate said transfer service would be somewhat in excess of $300,000.

4. The foregoing conclusions reached by affiant have been found to be well founded. The cost of all equipment required for Railroad Transfer Service to go into business and carry on said operation exclusive of working capital was approximately $325,000. A garage building was rented at 1214 West Monroe Street, Chicago, Illinois for a term of five years. A labor contract was entered into with Chicago Truck Drivers, Chauffeurs Union, Local 705,
729 for a period of 5 years. The useful life of the vehicles has been as above set forth and a lease was entered into with Radio Corporation of America for the use of a radio dispatch system for a period of five years.

/s/ Aaron Kazanow

Subscribed and sworn to
before me this 12th day
of August, 1959.

Frances Rosenberg /s/
Notary Public
(SEAL)

730

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

On motion of the defendant railroads it is

O R D E R E D that the transcript in re the pre-trial conference of May 11, 1959 be filed.

1 IN THE UNITED STATES DISTRICT COURT

* * (Caption -No. 56 C 323) * *
(Filed Jan 25 1960)

2 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Julius H. Miner, one of the Judges of said Court, in his court room in the United States Court House at Chicago,

Illinois, on Monday, November 30, 1959, at 10:00 o'clock a. m.

Present:

Lee A. Freeman, Esq.,
(Suite 514, 105 S. LaSalle Street,
Chicago 3, Ill),

on behalf of the Plaintiff;
Albert J. Meserow, Esq.,
(Suite 1353, 231 S. LaSalle Street,
Chicago 4, Ill.),

on behalf of Defendants John L. Keeshin and Railroad Transfer Service, Inc.;
Floyd E. Thompson, Esq.,
(Suite 3300, 135 S. LaSalle Street,
Chicago 3, Ill),
on behalf of Defendant Railroads.

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3 And thereupon the following proceedings were had herein:—

By the Court: I have spent a lot of time on this, but not so much on the motion for summary judgment. That will be denied.

On the question of the production of documents, that is very voluminous, and I don't know how many thousand documents there are; but I have gone over this, and I can give you briefly what I am going to rule.

In my judgment, for your own convenience and protection and intelligent understanding of my ruling, I would much rather dictate to my girl the review of the entire matter and give you each copies, and then we can discuss it.

By Mr. Freeman: That is satisfactory.

By the Court: It is quite voluminous. There are so many sets of documents, each one with different points of view. I never dreamed I would be back in this case again, as I told you before. I sent it out, because I thought I have had enough of it.

By Mr. Freeman: Your Honor, we feel this motion that has been presented by the defendants is an attempt to restrict in advance the plaintiff's case.

By the Court: I will say to you now I will sustain most of their objections. There are just two or three that I want to elaborate on in my ruling. I will give you a bird's eye view of it, if you wish.

By Mr. Freeman: If you want to dictate the memorandum—

By the Court: Here is the memo on it. It is quite voluminous.

By Mr. Thompson: I don't think it is necessary for your Honor to take the time.

By the Court: Paragraph 1 is well taken. No. 2 is well taken. No. 3 is well taken. No. 4 is well taken. No. 5 is well taken.

I have some doubts about No. 6, and I have some doubts about No. 10. The rest of them are well taken, the objections.

I will give you a copy of this voluminous document and give you my thinking on it so we can intelligently argue it. I want to hear you, gentlemen. I don't want to guess at it. It is quite involved.

By Mr. Freeman: Could you give us a date?

By the Court: I will say this about those objections that I said were not well taken. They will depend upon my perusing the documents themselves.

How close are we to trial?

By Mr. Freeman: We would like a trial date as soon as possible.

By the Court: You have been asking for continuances?

By Mr. Meserow: I want to take some depositions.

By the Court: What are you waiting for?

By Mr. Meserow: I am waiting for your ruling on the trial issues.

By the Court: Let me give you a copy of this within three days and set it down for a week from tomorrow for argument.

By Mr. Freeman: Could you make that a week from Thursday?

By the Court: Certainly. We are trying to redistribute the heavy cases, and at a meeting of the Judges, each of us have volunteered to take a heavy case from Judge Robson. I said I would take one, and the next thing I knew I have this one, and then Judge Campbell said, "Any objection?"

I said that I have no objection to what case was given me, but I got four other cases with it. That was an extra bargain.

By Mr. Freeman: Can we set this down?

By the Court: A week from Thursday, and I will see to it that you get my notes so we will know what we are thinking about. It will be easier for me to refer to my notes and for you to follow me. It is [illegible] involved.

By Mr. Freeman: Can this be set for 11:00 o'clock?

By the Court: 11:00 o'clock is all right.

By the Clerk: December 10 at 11:00 o'clock.

By the Court: Having reinherited this case, I want to rush it as fast as I can for trial. I want to cooperate with you. My calendar is being cleared up a little now. It isn't the pressure that I had a year and a half ago when I had them all, and I don't mind sitting down with you gentlemen and working out every detail, seeing if we can't stipulate to a lot of it and then go on to trial on the issues.

This is a jury case, isn't it?

By Mr. Freeman: Yes, and I think you will find the trial will be within reasonable limits.

By the Court: I am not going to rush you. I want you to present your case as comprehensively as you wish and you can.

By Mr. Meserow: Does your Honor overrule the plaintiff's motion for summary judgment?

By the Court: That is over with. There is no question about it. It is a question of fact, and I have prepared a note on that, but there is nothing for me
7 to qualify it. It would be error if I undertook it.

By Mr. Freeman: On the grounds there are questions of fact involved, your Honor?

By the Court: Yes.

By Mr. Freeman: May we have an opportunity to argue that on Thursday?

By the Court: Judge Sullivan had the identical thing years ago, and I will go along with his order.

By Mr. Freeman: You don't want us to argue that on Thursday?

By the Court: No.

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8 IN THE UNITED STATES *DISTRICT* COURT

* * (Caption—No. 56 C 323) * *

CERTIFICATE

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 7 is a full, true and accurate transcript of the original shorthand notes of all the proceedings had upon the hearing of the above-entitled cause, on November 30, 1959, before the Honorable Julius H. Miner, Judge of said Court.

/s/ Roy E. Fuller
Roy E. Fuller

Official Court Reporter
United States District Court
Northern District of Illinois

November 30, 1959.

731

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

This cause coming on for disposition of plaintiff's motion for summary judgment and the defendants' motion to limit and restrict the character of documents to be offered at the trial the parties come by their attorneys and the Court being fully advised it is

O R D E R E D that the plaintiff's said motion for summary judgment be and it hereby is denied, and it is

F U R T H E R O R D E R E D that disposition of the defendants' motion to limit and restrict the character of the documents to be offered at the trial be and it hereby is continued to December 10, 1959 at 11:00 A. M.

1 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 323) • •

(Filed Oct 18 1960)

2 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Julius H. Miner, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on Wednesday, January 6, 1960, at 11:00 o'clock A.M.

Appearances:

Thomas C. McConnell, Esq.,
(Suite 1110, 134 S. LaSalle Street,
Chicago 3, Ill.),

Lee A. Freeman, Esq.,
(Suite 514, 105 S. LaSalle Street,
Chicago 3, Ill.),
and
John Paul Stevens, Esq.,
(Suite 820, 105 S. LaSalle Street,
Chicago 3, Ill.),
on behalf of the Plaintiff;

Albert J. Meserow, Esq.,
(Suite 1353, 231 S. LaSalle Street,
Chicago 4, Ill.),

Jerome F. Dixon, Esq.,
Theodore J. Issacs, Esq.,
(Suite 1613, 231 S. LaSalle Street,
Chicago 4, Ill.),
on behalf of Defendants John L. Keeshin and
Railroad Transfer Service, Inc.;

Charles E. Hough, Esq.,
William F. Coale, Esq., and
Louis A. Witry, Esq.,
(Suite 1645, 231 S. LaSalle Street,
Chicago 4, Ill.),
on behalf of Defendant Hugh W. Cross;

Marvin A. Jersild, Esq.,
(Suite 1236, LaSalle Street Station,
Chicago 4, Ill.),
on behalf of Defendant The New York Central
Railroad Company;

Floyd E. Thompson, Esq.,
Philip W. Tone, Esq.,
(Suite 3300, 135 S. LaSalle Street,
Chicago 3, Ill.),
on behalf of Defendant Railroads.

4 By the Clerk: No. 56 C 323, Parmelee Transportation Company versus John L. Keeshin, et al., for the discussion of the Court's memo.

By the Court: I have a jury in the box. We are on trial. I just talked to Washington about getting some medical records here. How long will it take?

By Mr. Freeman: I think it will certainly take the rest of this morning, your Honor.

By the Court: The rest of this morning. Do you all agree on that?

By Mr. Thompson: I am sure it will take that long.

By the Court: I could give you the balance of the morning and recess the jury until two o'clock. Let me talk to the other lawyers.

(And thereupon, the Court gave attention to other matters on his call, after which the following further proceedings were had herein:—)

By the Clerk: Parmelee Transportation Company versus John L. Keeshin.

By Mr. Freeman: Is it possible, your Honor, to recess the jury until three o'clock?

5 By the Court: If it goes beyond two o'clock, I would rather give you another date, because there are twelve jurors waiting. I was hoping I could finish their trial today.

By Mr. Freeman: Your Honor has submitted a memorandum in this matter for the discussion of the parties. The memorandum deals with literally thousands of documents that have been identified by the plaintiff only by number to facilitate preparation for trial, but the Court specifically rules on the admissibility of each one of them.

As a matter of fact, there is a very stark restriction against the use of those documents that the Court regards as inadmissible, for the Court enjoins us, the plaintiff,

not to tender these documents at the trial, and then says that for impeachment purposes only they may be utilized, with the Court's approval, if a specific fact is to be contradicted by this document patently and explicitly and not by inference or implication.

I am appalled, and I know of no situation where any Court in the whole gamut of American jurisprudence
6 has ever entered an order of this character.

The defendants here seek not an orderly and efficient specification of issues at pre-trial in order to facilitate the conduct of the trial, but they seek to emasculate, and they seek to tear asunder the plaintiff's case, even though the pleadings that have been made here, the issues that ve been drawn by complaint and answer specifically provide and specifically would permit the areas of proof, the documents that are involved here as we will demonstrate.

I say, your Honor, that this Court has been misled, misinformed, and imposed upon.

My worthy colleague, Mr. McConnell, will deal with some of these problems, but I feel before we can appreciate the scope and character of the memorandum that has been submitted, it is necessary that you have a brief background of the plaintiff's theory.

The Parmelee Transportation Company was in existence for 102 years, and its services were expressly deemed to be satisfactory, deemed to be satisfactory in
1954, deemed satisfactory in 1955 by reason of docu-
7 ments that have been presented here.

In 1954 there was a committee set up to consider whether or not the costs of this transfer service could be held down.

By the Court: A committee set up by whom?

By Mr. Freeman: Set up by the terminal railroads, and it was a committee of six railroads, and these six

railroads had, in the past, had the same function, and they retained Parmelee.

After eight or nine months of these negotiations, at which time Keeshin appeared with the committee several times, the committee decided that there were no proposals before it that would warrant a change from Parmelee, and reported to the full committee of twenty-one terminal railroads and stated, and it was established at a meeting on February 1, 1955, that it was the consensus of opinion of all these railroads that there should be no change from Parmelee unless they were able to reduce the transfer charge from Parmelee's $1.20 to $1.00 or $1.10.

These remarks are made by the Santa Fe people on February 15 where Chairman Padrick says the following:

8 "Advised the lines present that it was the view of the committee studying the transfer arrangements that a change in operators should not be considered unless a bid of $1.10 or $1.00, including baggage, was submitted by such transfer companies."

The New York Central man said the same thing, and he said it with respect to Keeshin, as follows:

"J. L. Keeshin's proposal of $1.20 is not sufficient to change from Parmelee. The railroads would be worse off, because they would have to load baggage."

One of the men, Mr. Sullivan, of the Soo Lines, at that February meeting, said:

"The consensus of the committee meeting seemed to be there would be no point in disturbing the present relationship unless we could reduce it to around $1.00."

This was the meeting of February, 1955, and at that meeting it was suggested that the chairman contact

9 Parmalee and secure its proposal. Parmalee did make its proposal in February of 1955, and it proposed to

spend $500,000.00 for new equipment; it proposed various other aspects, and its proposal was favorably received, as the documents themselves indicate.

Not only that, but it was specifically determined at this March 17th meeting that Parmelee would be given an answer in thirty days. The period of negotiations was over. The interviews had been completed.

Here was Parmelee's proposal, and the New York Central vice-president, as a matter of fact, wrote to the chairman and said, "This looks like a very reasonable thing which we should accept."

Thirty days was the time for decision, and then came Cross and Mr. Keeshin, and I am not one to attack Mr. Cross, but Mr. Keeshin has placed him in this position. He has destroyed this man, and the Keeshin testimony, the Keeshin exhibits establish that Keeshin met with Mr. Cross in March, on March 29, 1955, in Washington. He had three to five meetings with Mr. Cross in Washington, and Cross had meetings with him in Chicago during the time from April 1 until June or July of 1955, the time of the intensive negotiations.

He had thirty-four long distance toll calls between Cross and Keeshin, most of them late at night, many of them of long duration, sixty minutes for one phone call, forty-five minutes for another, thirty minutes for another.

All the telephone calls Cross made to Keeshin were made at his home or were charged to his home phone. When he made a call at the Interstate Commerce Commission, he would charge it to his home phone. Every call Cross made during this period, not only to Keeshin, but to the presidents of railroads, when he made it at the Commission, he charged it to his home phone.

The testimony of both Cross and Keeshin admit and concede that they had many telephone calls about the

transfer matter, and this is Cross' testimony categorically.

I asked him the question:

11 "Were there many telephone calls with Keeshin about the transfer matter?"

And he said:

"Yes, there were."

I said:

"Did Keeshin call you about it?

"Yes, he did.

"Did you call him about it?

"Yes, I did."

That appears in Cross' deposition on pages 714 and 715.

What were these telephone calls about? Keeshin and Cross both testified, first, that Keeshin requested Cross to put in a good word for him with the railroads with whom he was negotiating. I don't make that up, as it is their testimony.

Secondly, that Cross conceded that he had reported to Keeshin on his talks with certain of the railroad presidents, Feucht of the North Western, Simpson of the Baltimore & Ohio, and possibly he said Johnston of the Illinois Central, and when Keeshin got this transfer company contract on June 13th, Keeshin testified he

12 called Cross and thanked him for the help he had rendered.

How did Cross make these contacts? First, it was to contact the railroads in the east. This committee consisted of six railroads, three in the east, the Baltimore & Ohio, the New York Central, and the Pennsylvania, and three in the west, the Illinois Central, the North Western and the Santa Fe.

This is how the committee was formed, and Cross first went to Baltimore. He went to Baltimore, we contend, on April 8, 1955, and on April 23rd.

They concede April 23 but deny April 8, but Simpson's

diary and his secretary's diary show here a Commissioner of the United States Commerce Commission, shortly to become chairman of the Commission, traveled to the president of this railroad in Baltimore and spoke to him about the transfer situation and spoke to him about the Baltimore & Ohio financing, which was one of the most complex and one of the most important railroad financing situations in the history of the Interstate Commerce Commission.

This Commissioner went to the president of that
13 railroad and discussed these items with him, and both Simpson and Cross so agree.

That is not all. There were five toll calls from Cross' private phone at home made either while he was at the Commission or when he got home to Simpson during key points in this conspiracy, and what does Simpson say? "Every time Cross called me, he spoke to me about the transfer matter."

Here is his testimony--Simpson testifying in deposition on page 61:

> "Yes, Cross called me in connection with the transfer matter on a number of occasions of which you have telephone records."

We asked him:

> "You do recall that he asked you about the transfer matter in these subsequent calls?"

Listen to this answer of the president of the Baltimore & Ohio:

> "He didn't ask me. He told me."

When Keeshin got the transfer contract, Cross admitted that he called Simpson on June 8 to tell him
14 that the committee had done a good thing in giving this to Keeshin, to thank him, in other words, for the help he had given him, and this is Simpson.

Both Cross and Simpson admit that they had these telephone calls, that they did discuss the transfer thing, and we find Mr. Cross traveling to Baltimore for this purpose, and we also find him traveling to Philadelphia, because Mr. Carpi testified, the vice-president of the Pennsylvania Railroad, that in April, right at the forefront of this conspiracy, Cross visited him in Philadelphia.

He refused to say that Cross discussed the transfer thing. He denied it, but Cross stated that it was quite—Cross' testimony was that he admitted he discussed the transfer with Carpi, but in a casual way. He made six toll calls to Carpi.

At the same time he was calling Simpson, or close to those dates and close to those hours.

He would call Baltimore, and then he would call Philadelphia, and I contend the record is quite clear that Cross' activities with Carpi during this April to June 15 period were in connection with these transfer negotiations, and the railroad's own memoranda demonstrates it.

There is a New York Central man named Bone, chairman of this committee, and he called Smart of the Illinois Central on April 28, and he says, "I understand certain railroad presidents have been contacted", and then on May 23rd the Santa Fe Railroad said, "Keeshin had appealed to the executives of the Baltimore & Ohio, Pennsylvania, Chicago & North Western, and possibly others."

What did these men do? They said there was a matter of high policy involved. "Our next meeting must be one where the top executives appear, because we have a problem."

What about the New York Central? When the Baltimore & Ohio president was contacted in April, he immediately called in his top passenger executive and talked

to him about it, and we find the top passenger executive goes to New York and says to a New York Central vice-president, "It is time we changed from Parmelee", and Mr. Perlman, the president of that railroad, on April 27 discussed this matter in Chicago.

16 Can you imagine the president of this billion dollar company discussing a minute problem like the transfer arrangement in Chicago? He does, and he says to this man, "Keep this case open until I have had an opportunity to analyze it", and the chairman of the committee plaintively talks to his New York counterpart, Mr. Baird, and says, "What should the position of the New York Central be in view of Mr. Perlman's analysis?"

That was April 27, and on April 28 this same man, Mr. Bone, called the committee members, including the Illinois Central, and said, "I understand the presidents have been contacted," and on April 29th the Illinois Central president, Wayne Johnston, went to Washington and said to Cross, "I understand that you are going to get a job with Keeshin if he gets the transfer contract," and Cross said, "Yes, that is true," on April 29.

There is the New York Central. What about the North Western? If there is any dispute about this, I will quote Mr. Johnston's testimony, because it is just as clear as a bell. Here is his testimony:

17 "On April 29 I went to Cross in Washington and asked him if he had any intention of coming to Chicago, and he said if things worked out satisfactorily he probably would come to Chicago in connection with this contract. I would assume that his interest was that if Keeshin received this contract, that he was to come to work for him. He gave me the impression that he was coming to Chicago if everything worked out satisfactorily."

And then this question:

> "It wasn't just a question if everything worked out satisfactorily. He specifically stated that if this company receives this contract he was going to work for them?"

And Mr. Johnston's testimony, "That is right."

The North Western president, Mr. Feucht, was called on May 13 by Mr. Cross. He called Simpson and he called Carpi on May 12 or May 13, and he called Feucht on May 13, and Feucht prepared a memorandum of that call, and that memorandum is very illuminating of
18 Mr. Cross' activities at this time.

It is entitled, "Memorandum of my conversation with Hugh Cross, Commissioner, Interstate Commerce Commission, 4:15 P.M., May 13," and I will just read the first sentence, which is as follows:

> "Hugh Cross stated that he was very much interested in seeing that J. L. Keeshin got the new contract with the railroads here in Chicago to handle baggage."

and so forth.

What else did Mr. Feucht say? Mr. Feucht said that as a part of that conversation Mr. Cross said to him, "How are you getting along? Do you need an increase in commutation fares?"

Feucht said, "No, we just got one." Feucht also testified that he had no acquaintanceship with Cross, that he was quite upset by this call, that he felt it was improper, and that is his testimony.

Well, these telephone calls occurred, and in consequence, whereas a decision was to be given in thirty days
19 after March 17, instead they set up a committee meeting on May 19.

May 19 was an important date, because suddenly this committee is expanded, and the top executives of Balti-

more, of Philadelphia come to Chicago to attend a meeting for the first time in their history.

The top executives of Illinois Central and the North Western likewise come to this meeting. Obviously, something more than merely a determination of this transfer was involved.

There was a policy, and Parmelee transmitted a proposal establishing a maximum rate for six years. There was a discussion, and the committee recessed until June 3rd for the purpose, as they themselves said, of getting an expression of opinion from their top executives, not the top passenger executives, but their top executives.

Surely, the shadow of Cross' influence was there, and so we contend, but what happened? There were three memoranda prepared as a result of that meeting, three memoranda specifically recommending Parmelee. There may have been more, but we only procured three of the three western railroads, the Illinois Central, the North Western, and the Santa Fe, and let me just read this.

Here is the North Western's memorandum of May 27 from their vice-president to their president:

> "It is the view of our passenger people, and I understand the same view is held by the committee members from the other railroads that Parmelee should be awarded the contract because of their years of experience, their financial integrity and the fact that they have given us a definite maximum of $1.25 per coupon after the fourth year of the contract."

As a matter of fact, the memorandum written to this vice-president says:

> "It is quite possible that the Parmelee rate per coupon would be less than the Keeshin proposal."

Remember that this whole negotiation was because of

the cost. They wanted to hold the costs down.

The Santa Fe said the same thing, only more so. The Santa Fe memorandum of May 23 said as follows:

21 "We propose to recommend the continuance of our arrangement with Parmelee because of our long association with that company, and its satisfactory transfer of our passengers and baggage between terminals. We believe that the proposal submitted by Mr. Markin is superior to the proposal submitted by Mr. Keeshin because we have assurance of a maximum coupon rate in the fourth and fifth years, and in addition, we will avoid the possibility of labor trouble in connection with operation by a new company with different union."

These three memoranda of the western railroads caused consternation in Mr. Keeshin's and Mr. Cross' camp, and we find from the toll records there was an intensive amount of long distance telephoning between Keeshin, between Cross, and between a man named Forgash, an agent of the New York Central Railroad, who was the president of one of their important subsidiaries, U. S. Freight Lines, and who is well established as a key actor in this drama.

22 As a result of these telephone conversations, I contend, and we have not proven that part of it yet, although we have proven everything else I have said, on May 25 Mr. Cross sent three telegrams.

He sent three telegrams to whom? To the president of the Illinois Central whose man had made a recommendation favorable to Parmelee, to the president of the North Western, the president of the Santa Fe, the three railroads who we know had favorable memoranda following the May 19 meeting, and these telegrams said:

"Expect to be in Chicago May 31 — June 2, at which time I shall call. Hope I may have a short chat with you."

How nice He knew that the committee had recessed until June 3rd. He was coming in, because it was essential to get western railroad support, and his intervention was effective.

The three western railroads switched their vote at midnight practically on the eve of the June 3 meeting, or on the next day, and they awarded the contract to Keeshin at a higher potential rate, and without even determining some of the essential elements of the transfer arrangement, things they had been discussing at
23 great length, and they didn't even determine them.

How did Cross accomplish this, and what happened to Cross when he came to Chicago? This is a fantastic story of conspiracy, established by records and admissions.

Cross first called Mr. Feucht at 10:00 A.M. on June 1 in his office. Feucht had not come back from his Memorial Day week-end, and he left word he could be reached at the Union League Club.

Feucht called Cross and he didn't find him in, and he showed the telegram to his special counsel, Nye Morehouse, and asked him to get in touch with Cross.

This is Feucht's testimony on page 2727 to 2728 and other pages.

Morehouse, who didn't know Cross from Adam, who had never talked to him before, called Cross and went up to his bedroom in the Union League Club June 2.

He went up there, and what did he discuss? They both admit that he discussed the class rate case, and a division case that was then pending before the Commission, which has been described before the Commission
24 as one of the most important cases in the last decade before the Commission.

He discussed those cases, and the code of ethics, which has been excluded here, specifically prevents any par-

ticipant in the lawsuit before the Commission from discussing it ex parte with a Commissioner.

It is an obvious principle, but he discussed this with the Commissioner, and this was on June 2, and on June 11 the matter was to be argued before the full Commission.

All of the preliminaries had been concluded. The case lasted a year. Mr. Morehouse steps up, and there is the Chairman of the Commission, Mr. Cross, who he had visited in his bedroom, and he says, "Mr. Chairman, I would like to introduce myself. I am Mr. Morehouse."

How blatant could they be, and this is excluded.

What about the Santa Fe Railroad?

First, you know the North Western, Mr. Feucht says that the decision was made in a meeting with Brennan, his passenger manager, the evening of June 2, and Mr. Brennan prepared a very enlightened memorandum, because Mr. Brennan's memorandum says, "We have changed from Parmelee to Keeshin," and I quote, "due to new developments during the past twenty-four hours."

If you want to know how significant those new developments are, read the North Western's annual report for 1955 where they spend a page telling you about the tremendous success they had in these cases that Morehouse and Cross discussed on June 2.

Well, Feucht gave one story of why he went for Keeshin. Brennan gave another story. This, too, is indicative that both of them didn't know what they were talking about, and the only reason they went for Keeshin was Cross' intervention.

What about the Santa Fe? Cross sent a telegram to Gurley, and Gurley testified that just prior to June 3, the day of the committee meeting, he asked his executive vice-president, Rydin, to bring him up to date on the transfer.

He said, "I never in my whole experience with the railroad ever came in contact with this transfer problem," and Rydin, his executive vice-president, gave him the
26 memorandum that their passenger department had prepared. It was a memorandum recommending Parmelee.

It was a memorandum which specifically stated on its face that Keeshin had contacted the Baltimore & Ohio, the Pennsylvania, the North Western and possibly other railroads, and Gurley said to Rydin, "We are going for Keeshin," and when I said, "What reasons did you give him," he said, "I gave him no reasons."

This man, Rydin, went over to the vice-president in charge of passenger traffic, Duffy, and here is the way the question was put, and this is their testimony:

> "Mr. Duffy, if it was possible and the Santa Fe would not be injured, we would like to seriously consider giving it to Keeshin."

Duffy testified that way two or three times that the question that was put to him was not whether Keeshin's bid was better than Parmelee's, but it was, "Can we go for Keeshin without injuring the Santa Fe?"

Mr. Duffy further said he instructed his committee-
27 man, and he said it this way: "We had as a matter of policy decided to vote the contract to Keeshin." That is all the Santa Fe does.

What about the Illinois Central? Well, the Illinois Central, Mr. Johnston, the president, knew of Cross' personal interest. He knew that Cross would get a job if Keeshin got the transfer contract.

He asked Cross that, and Cross admitted it. He also received a telegram from Cross and he sent back a cordial telegram to Cross saying, "I will be in Washington this week, but if I don't catch you there, I will be back and glad to see you on May 31 to June 2."

Cross came in to see Johnston on June 1 or June 2. The Illinois Central had a memorandum recommending Parmelee, and their committeeman began telephone activity on June 2 starting at 7:00 P.M. at night and lasting until 10:00 P.M.

This kind of nocturnal activity by a company that was considering this on the merits is impossible to conceive, but they did, and he made all kinds of notations and all kinds of reasons, and on June 3, in the morning, they decided to vote for Keeshin five minutes before the
28 meeting.

The same thing happened with the North Western. The committeeman at the North Western didn't even know what the determination was going to be until, as he said, he was on his way over to the committee meeting with the passenger manager, and Mr. Brennan said to him, "Mr. Quackenbush, we are going for Keeshin," the first he ever knew about it.

Cross was a very self-sacrificing man. He traveled to Baltimore and Philadelphia and Chicago at his own expense. He made all these toll calls and sent all these telegrams at his own expense.

It wasn't for official business. It couldn't have been. Cross did say, "I charged these calls to my own bill because the appropriations for the Interstate Commerce Commission were inadequate. I took up part of the burden."

It was a public spirited idea, but when we had the financial officer of the Interstate Commerce Commission on the stand, we found in 1954, 1955, and 1956 they got more money than they asked for. They got eleven
29 or twelve million dollars in the appropriations, and Mr. Cross had to pay for his own telephone calls. It doesn't make sense.

Keeshin did call Cross and expressed his appreciation for what Cross had done, and I say he expressed it more concretely. No. 1 was the executive job that he had promised Cross, and what is the testimony?

Mind you, Judge, we are not at the stage where we have proven everything, where we have put in all our evidence. These are admissions on deposition, and these are admissions that are contained in documents, and they are hard to get.

This much we have proven more concretely, I imagine, than any case that has ever been pending in this court.

What did Keeshin say about the executive job? He conceded he had offered Cross a job, but in connection with the possible purchase of a bus company in 1954, that he had never rescinded that offer, that he had a general understanding with Cross he could have a position with him whenever he left the government, and that understanding and that offer was in existence at the time of the transfer negotiations.

This is his testimony. What did Johnston testify? I have already told you that. He heard a rumor from a railroad man on April 28 or 29 and went down to Washington to ask Cross about it.

What did Mr. Gurley of the Santa Fe Railroad say? Gurley filed an affidavit, and we have the affidavit, and you have excluded it in your ruling.

Gurley's affidavit says very, very clearly that prior to the grant of this transfer thing, and I quote, "I heard rumors and statements to the effect that Mr. Cross would become associated with the Keeshin organization if it should succeed in securing . . ."

By the Court: Let's stop right here. This very document you are talking about, which is probably symbolic of others — is that right?

By Mr. Freeman: Yes, your Honor.

By the Court: How could you possibly admit that document in evidence under any conditions, and how could I possibly sustain it legally?

31 By Mr. Freeman: You could admit it in evidence under any condition. There are no conditions under which this is not admissible. There is a broad avenue of proof known as admissions against interest.

Mr. Gurley is a defendant in this lawsuit. Mr. Gurley is president of the Santa Fe Railroad, a defendant in this lawsuit. He has prepared an affidavit under oath.

This affidavit says that he knew prior to the time he made his decision for Keeshin that Cross had a personal interest in this particular contract, in that he was going to get a job.

That is an admission against Gurley, and since we have alleged a conspiracy, which we think we can adequately establish, this admission is binding upon all the co-conspirators.

By the Court: Not when Gurley is available as an adverse witness.

By Mr. Freeman: Your Honor, we could merely submit questions to them for admissions and they would have to give it to us. We don't have to proceed on

32 the basis of testimony of Gurley, although we are going to bring in Mr. Gurley.

By the Court: If you submit questions, that is one thing.

By Mr. Freeman: Your Honor, we can ask this be admitted in evidence as an admission against interest. We are fortunate to have these kinds of documents.

Normally in a suit of this kind, we are not so fortunate. It is very rare, your Honor, for any kind of a conspiracy to have one document which sets forth the entire conspiracy and is signed by all the conspirators.

This is what you are compelling us to do. We have

the equivalent of that in a compilation of documents that they did sign, in a compilation of memoranda they did prepare and are responsible for, and their testimony under oath, which we will bring out either in the form of depositions that will be submitted for those witnesses that are not available, or that are now dead, or the actual testimony, but this is a perfectly conservative ortho-
33 dox 100 per cent basis of proof.

There are no reasons that I know why this can be excluded, and the defendants have not asked that it be excluded, your Honor.

You have ruled this is excluded, and the defendants have not asked that it be excluded. They have said, "This affidavit is immaterial and hearsay as to every one but Gurley," but they concede that it is admissible against Gurley.

We want it admissible against Gurley. That is Mr. Gurley's statement.

Mr. Feucht testified—and Mr. Feucht is the North Western man—that shortly after he had received this telephone call from Cross on May 13th that his traffic manager reported to him, "There are rumors floating all over Chicago that Cross is to get a job with Keeshin if they get the transfer contract."

This is pretty substantial proof of this kind of a pay-off, if you will.

We have also gone further, and we were able to establish that not only was Cross intending to take this job, but he took concrete and affirmative steps to do so
34 by buying a house in Deerfield, Illinois.

All of this is excluded, and all of this, you say, is inadmissible.

Keeshin was awarded the transfer contract on June 13, and he was to go into service on October 1.

On June 28, two weeks later, Cross came to Chicago

and selected a house on June 29 in Deerfield. He himself said, in a letter he wrote, "The house which I bargained for so hurriedly . . ."; and a contract of purchase of this house was executed on July 11, 1955, and in this contract of purchase Cross, in his own handwriting, interlined, "possession to be given buyer on September 15, 1955."

Why? Because he wanted to be in that house two weeks before Keeshin went into service on October 1, and Cross transmitted this contract in a handwritten letter, and he said, "Please treat this matter in confidence and withhold the use of my name." This is Cross' letter: ". . . withhold the use of my name."

Yet, your Honor, Cross proceeded surreptitiously throughout these things. All his communications for this house were written out in longhand by the Chairman of the Interstate Commerce Commission, by one of the more important government functionaries of this country, writing these letters out in longhand. Why?

He didn't want his secretary to know. What is more, Cross made thirty-four long distance calls—these calls with Keeshin, and while he made many calls to these presidents, too, his secretary testified she knew of not one single call.

He kept it from her. This is part and parcel of the conspirators' activity. He kept from his secretary what he was doing.

His secretary's deposition was a complete flop, Judge Thompson thought. She knew nothing, and that is right, but she should have because this guy was a busy guy.

On July 19, 1955, his broker, Wilbur, wrote to Cross that he was going to take an architect out to this house and get his ideas and the approximate costs of providing a room for his maid.

At first there was intensive effort to get this house deal closed before October 1, but the Senate investigation

started in the middle of September, and what do we find? It is a slow-down, and on November 16 the seller's attorney, Clarence Dever, a man of tremendous integrity, not involved in this case, is advised by Cross' broker, and look what he is advised:

> "In view of the Senate Committee investigation with reference to Hugh Cross, Mr. Cross was more anxious than ever to drop the deal and would gladly forfeit the $4,500.00 already paid."

This house had a price of $38,000, and he put up a deposit of $4,500.00, which was no percentage relationship to that price, but I will indicate to you where I think the $4,500.00 may have come from.

Here on November 16, and the executive committee meeting of the Senate was September 15, but on the 16th Cross is advising the seller, "Keep my $4,500.00.
37 Cancel this deal in view of the Senate investigation."

He was told he couldn't. He was told they would not accept the forfeiture and they would ask specific performance to go through with the house deal.

What did Cross do? He bought the house in the name of his broker. It was later put into a land trust.

The broker put up the money and took title to it, and Cross resigned and moved into the Deerfield house in December of 1955 and put it on the market in April of 1956 and sold it in May of 1956.

Who did he sell it to? He sold it to M. E. Klein, the manager of coal traffic rates and sales of the Pennsylvania Railroad. Is this a coincidence? Maybe it is.

Mr. Klein testified he didn't even know who Cross was. Mr. Klein's activities were being handled by the General Attorney for the Pennsylvania Railroad, Mr. Haberkorn, who was in all the legal committee meetings of the railroads dealing with the Keeshin contract and the Cross problem, and he testified he didn't even know who

38 Cross was, whose house he was coming into and buying.

Well, I don't know what the inferences of that are and how far our proof is going to go, but certainly we shouldn't be precluded now. Certainly our hands and arms and hearts shouldn't be cut out at this time when we are attempting to establish some of these facts.

This is the house deal. This tends to establish concretely that Cross had an intent of coming to Chicago. On the day he signed the July 11 contract to purchase the Deerfield house, he also listed his Washington house for sale, the same day, the first time he had ever listed his Washington house, and Thompson says, "No", but the testimony is that it was the first time it was ever listed.

We also contend that cash was made available to Cross through his son, and it was $4,500.00 in cash by a trailer deal.

The United States Freight Lines is a subsidiary of the New York Central. The New York Central owns forty-five per cent of the stock through a securities com-
39 pany, the Linden Securities.

United States Freight owns all the Lasham Cartage Company. The United States Freight's president is Morris Forgash, a man who appears in this thing ad infinitum, and whose deposition we want to take again for evidentiary purposes because Mr. Forgash resides in New York, and we had considerable difficulty with him the last time we got him, and we want him now.

Under your ruling you exclude everything about Forgash. You exclude his telephone calls to Cross, and you exclude his telephone calls to Keeshin, and you exclude the fact he was in Washington and in Chicago at every key point during this entire conspiracy.

On every day that has any significance, Forgash is

here, and you say, "All of these documents are out."

Actually, we want his deposition. We will take his deposition whether your ruling will stand or not, but we urge you that this kind of a limitation on our ability to discover evidence, on our ability to establish proof, can't be. It can't be.

You didn't intend it, and you have been misled in this matter.

Forgash is president, and his company was negotiating in New York for the purchase of thirty trailers from the International Harvester Company and General Motors.

They were dealing with the factory branch in New York and there is the customary way of doing it.

On April 13, and mind you, the contact between Keeshin and Cross is the latter part of March of 1955, on April 13 this guy and the New York company writes down to Carrolton, Illinois, a community I suspect your Honor isn't familiar with, although you have toured the State, and possibly you are, but in Carrolton, Illinois, there was a little company called the Carrolton Farm Supply Company owned by Hugh Cross' son.

He had never sold a trailer in his life before. He had never had a single dealing with Lasham Cartage, and they said, "We will buy the thirty trailers from you. You will get $150.00 apiece, or $4,500.00. You have only to sign the document, and you have nothing to do, no obligations, no commitments, nothing. Sign it, and we will send you the check when the trailers come to us."

The trailers were shipped out of Ohio to New York. April of 1955 is when the deal was made to give Cross this, and June was when it was completed. July, 1955, was when the deposit was made for the house.

I don't know whether that $4,500.00 was used for the deposit on the house, but I say this $4,500.00 was cash made available.

There are telephone calls from Forgash down to Carrolton.

42 There are calls from Keeshin to Carrolton, Illinois, and to Hugh E. Cross, and all of these telephone calls you would say are inadmissible.

We can't connect them up and we can't even tender them in evidence.

Well, we think that as our complaint alleges, Keeshin procured the help of Cross to influence these railroads, and he gave Cross an inducement of certain valuable considerations.

One was the executive job.

Secondly, there was the trailer deal, and there are others in this record that I won't mention.

The railroads had a significant stake here, too, and they were being approached by an important man. It is conceded in answers to our complaint that there were many important regulatory matters pending before the Commission.

Cross continued as a Commissioner deciding cases involving those individuals, those companies who he had gone to for aid, and what is more, they were private conversations.

They were private conversations about some of
43 these regulatory matters between Cross and these same people who whom Keeshin was negotiating.

I have told you about the Baltimore & Ohio financing thing. It is a big thing and can't be belittled.

I don't want to go into the details of it, but I think it is significant. You have excluded it.

I have told you about the class rate thing, the conversation with Mr. Morehouse in Cross' bedroom the day before the decision, in the month before the argument.

This, too, is important.

I should also tell you about a case that only involves

$70-million a year in additional revenue, the coal roll back case, and the decision of the Commission was four-to-four, and Cross voted for the railroads, so that that rate was not suspended and was not subject to investigation, even though a year before Cross had participated with the Commission and established the very rate that was being rescinded.

Is this significant? Is this something that we
44 should be permitted to go into before the jury?

I say that your ruling with respect to not tendering documents, with respect to this limited and constrained impeachment possibility destroys our opportunity for a jury trial.

You are usurping the authority that should be with the jury to determine what inferences lie in this proof, and it is said, your Honor, in connection with some of these Cross matters that, "We, the railroads, didn't know about it, and therefore, you must exclude it." But they knew.

These six railroads that are defendants here knew of Cross' activities, knew of Cross' executive job, his personal interest.

The Baltimore & Ohio knew, because Simpson had personal contacts with Cross and admitted it. As a matter of fact, Simpson sent his messenger boy, the traffic, the passenger traffic manager Whittington, to do the work on this thing.

Whittington came to Chicago to the meetings for
45 the first time, and he led the discussion, and his memoranda shows he was willing to offer Keeshin four cents more a coupon as a top rate than we had offered, only to get it for Keeshin.

He was a participant, because his president had directed it, and the New York Central—I have told you enough about them.

The Chairman of this committee had related the fact that presidents had been contacted after Perlman, its president, had said in Chicago, "I want time. Keep this case. Don't decide it now. I want to analyze it."

That is a euphony.

"I want to see which way to swing on the Cross situation."

As to the Illinois Central, their committee member was told by the New York Central of this contact with the president. Johnston, the president, made inquiry of Cross about his executive job and was told that was true, and Cross came to Johnston on June 2 and visited him.

The Santa Fe, the North Western, the Pennsyl-
46 vania, they had knowledge of various aspects of Cross' activities.

Let me go now to the order itself, if I may. You have sought in this order to provide detailed rulings on thousands of documents. The issue isn't even before you. The issue is not before you.

We had listed documents by numbers pursuant to what we felt was an accommodating order, to both parties, to make available the outside limits of the documents that would be produced at the trial with no surprise, but we said in our list, "We don't think we are going to have to submit all of these, because we think, because of admissions and other things, and the progress of the trial, a lot of this will be dispensed with."

We also said, "We may have additional documents as a result of discovery, and we will tell you about them."

Keeshin and Cross, two principal defendants, didn't even file a list. They said, "We will submit whatever documents are relevant," and nobody quarreled with them.

Objections were filed. As the order required, we
47 filed objections on the ground of materiality, and they filed objections largely on materiality and relevancy.

The only issue presented to your Honor was an issue in a motion prepared six months later by the railroad defendants. They filed a motion in which they said, "Strike this list of documents. It doesn't perform the function we had hoped, or, in the alternative, carve out certain areas of proof."

In this motion and in the supporting memoranda there was no discussion of the individual documents. "Here are scopes of evidence," they said, "which you can rule upon, because there are no factual controversies. There are no issues that you need to be informed about at the trial. You are in as good a position now as you were then." Phony--but nevertheless, this is all that you were presented with, your Honor.

You were requested to rule upon the admissibility of these individual documents, and many of them do not lie within the scope of proof that was being discussed in these motions.

48 As a matter of fact, the defendants themselves, in their motions said this, in their memoranda on page 5 in support of their first motion when they said, "Carve out these areas," that, "obviously, there are many objections upon which the Court can rule only in the course of trial. Objections of this category have not been included in the instant motion."

You have ruled, your Honor, on thousands, literally thousands of alleged objections and alleged documents.

You have moved them in and moved them out of this case, and where you have moved them out you have said that we cannot even tender them, and you have not seen a single one of them.

You have not seen a single one of these documents. These documents are described in instances as a memorandum from Norton to Brennan, a memorandum from Brennan to Norton.

The first memo is in, and the second is out. How could you come to such a conclusion?

It is impossible to determine the materiality and relevancy when the documents are not even adequately
49 described, when the plaintiff never even argued these objections that were made to documents.

This was merely an attempt to preserve objections so there wouldn't be a concession. The real purpose was if there was an objection to the genuineness of a document, this could be resolved in pre-trial.

This could be an important and constructive step in facilitating the trial. The party would have an opportunity to establish genuineness, and this was really the only thing that could be accomplished at pre-trial, not the ruling upon materiality and not the ruling on relevancy.

We didn't make a mass offering of these documents as your order would indicate. We didn't make a wholesale offer.

We listed them, and we intend, if permitted by your Honor, to submit these documents individually to provide a proper foundation and identification to demonstrate their materiality to the issues as the trial progresses in an orderly and proper manner.

We don't propose to even offer two documents at the same time. We will offer one.

50 We expect the jury to digest this as well as the Court, and we will do it only in that form.

There is no attempt at the wholesale offering of proof as your Honor seems to indicate, and as expressly as alleged.

It seems to me, your Honor, and I say this in great deference, that this decision could not be a matter of judicial determination but clairvoyance.

You would have to have a clairvoyance. I could not de-

termine and identify these documents with any care in less than six months or three months, after I have worked with them for many years, as there are so many and they are so diverse, and you have made specific errors and glaring errors.

For example, your Honor, you have admitted, you have overruled an objection of their's dealing with Keeshin memoranda. This is item K-54, 57, 58, 60 and 61.

We didn't even list them. They were not on our list. They were self-serving memoranda prepared by Mr. Baxter, which was an attempt to justify a situation.

51 We didn't offer them, but you have overruled an alleged objection, and these, therefore, become admissible.

Am I to construe that to mean the defendants have the right to put those self-serving documents in? I assume not, but here are documents that we didn't even list that you have admitted, and there are others.

Here is a very important item, your Honor, Item No. 3 in your memorandum, which says that you sustain the objection and you make it admissible. These are telephone company records of the Baltimore & Ohio toll charges.

There is no such thing. You know what that Item 3 was? It was the telephone records of Cross—ninety-three telephone slips charged to Cross' telephone, upon which there were admissions and confessions that Cross had made calls in connection with the transfer matter to Keeshin and to railroad presidents.

They are all excluded under a misapprehension and a description that is not accurate.

Item No. 22, page 3, is next. Again, you eliminate

52 all of what you say are documents concerning the sale of Cross' house or the purchase of the house, but there are included in those documents, Exhibits 3 and

6, for example, that relate to the coal roll back case, not even to the house.

Item 14, page 4. You exclude the Forgash documents, and I have already discussed that, but here I must call your attention to 14 and 16 where you have excluded all of the documents except Forgash Exhibit 1, and Ryan Exhibit No. 1.

This, I construe as a sardonic sense of humor, because those two documents are the subpoenas that we served on Forgash, the subpoena that we served on Ryan to produce these documents that you now say are inadmissible, and you tell us that we can, before the jury, present to the jury the subpoenas that we served on them and nothing else.

I think it was the result of a misapprehension, your Honor. I think it was the result of a misconception of what was involved here. I think you have been imposed upon, as I say.

53 Let's go further.

By the Court: Here I have before me that the defendant railroads and railroad presidents move to strike the list of documents filed by plaintiff, and so on down the line, in a document filed in 1959.

I have another one, the plaintiff purporting to respond to an order, and so on. I am going to the orders before me.

Of course, I have not had a chance to examine the documents. I never purported to make any such statement. They were bulked in thousand lots, and I merely passed upon the propriety and admissibility of these lots in wholesale bundles.

By Mr. Freeman: You didn't do that, as I will demonstrate to your Honor. Let me show you, for example, your rulings here on these examples that go beyond the defendants' objections.

In Item No. 4, and this is a good example, in Item 4 where you say that Simpson's appointment book and Simpson's secretary's appointment book are excluded, inadmissible.

This is a specific item. Here is the item. Here is Simpson's appointment book.

54 On April 8 he shows a meeting with Hugh Cross, ICC Commissioner Cross.

On April 23 he shows a meeting with Cross. His secretary shows the same thing.

This is part of the traveling Commissioner bit. This is part of Cross going to Baltimore to talk to this fellow and they admitted that they talked about the transfer.

This is a specific item, not bulked in thousands, but this is a specific item that is excluded.

Here is another item of Johnston. Johnston presented a telegram. Cross admitted that he had sent three telegrams to Johnston, Feucht and to Gurley, and the telegram to Feucht is admitted.

Cross sent the telegram saying, "I will be in Chicago," and this is one item, Item 2 and 37, documents consisting —and actually this is only one document—consisting of a telegram from Johnston, president of the Illinois Central to Cross, and this is an answer to the telegram from Cross, and it says:

"Dear Hugh: I shall be in Washington tomorrow, Friday, for a Board meeting, and if the length of
55 the meeting permits will contact you. Expect to be back in Chicago Saturday and will be delighted to see you when you are here May 31 through June 2."

He did see Cross. This telegram is throughly admissible. It is excluded and excluded specifically.

Here is the specific item of Hugh Cross' registration at the Union League Club, the days he was there during this

period. One time it is May 31, 1955, at 10:50 P.M., to June 3, 1955, 5:00 P.M. He was there, and this is when he said he would be there. He was at the Union League Club.

He had a meeting with Morehouse there. There are other such meetings, and there are not many—four registration slips, and only two or three of them are significant, but all specifically excluded, not in any thousand lots.

Take the Senate transcript, your Honor, and here is an exclusion that is of key importance, and here again you have gone completely beyond the defendants' position.

You have said to us that we cannot tender the
56 Senate transcript, that we cannot refer to the Senate transcript except for impeachment purposes and then only if explicitly, if concretely we are able to contradict a specific fact, not by inference or implication.

Here is what Mr. Thompson said to Judge Robson in pre-trial, and in his memoranda before you.

Mr. Thompson said on page 15 of his memorandum:

> "Admittedly the statements made before the Senate sub-committee by defendants or other persons would be admissible in this trial either as admissions of a party or, depending upon the course of the trial, as self-contradictory," and

he didn't say self-contradictory so specifically that you could draw a line and know yes and no, but he said that we can refer to them; that we can use them as admissions against interest, and he said it again in his reply memorandum on page 37:

> "We do not contend that evidence may not be re-received against a particular defendant of an admis-
57 sion made by him in his testimony before the Senate committee, but we contend that no reference should be made to the Senate committee."

They said that would prejudice them, and that contention was based, not upon any case reference, but he was trying to promote a new principle.

By the Court: I would admit legally and almost in blanket form admissions against interest as admissible.

By Mr. Freeman: Of course.

By the Court: In any form and in any shape and manner. The defendant in his own rights makes an admission orally or in writing against his interest pertaining to the issues in the case before me, and I would have to be blind or dumb to exclude that from the record.

If any of those are included in there, in passing upon thousands of bundles, you will find probably a good many of them, and I can't predict now or prejudge it, but I am positive that if some individual documents were brought before me and were brought within the confines of the propriety of evidence, why, of course, I would admit them.

58 By Mr. Freeman: Your Honor, this is our whole argument.

By The Court: That isn't what the briefs say. I have had fourteen or fifteen bundles of documents.

By Mr. Freeman: Your Honor, how are we going to argue the admissibility—

By The Court: Only by submitting them to counsel and going over them individually, and if they are material to the issues, I can pass upon them.

By Mr. Freeman: Your Honor, we didn't submit any bundles of documents.

By The Court: Of course not. I didn't see the bundles. I am talking about fourteen groups.

By Mr. Freeman: There were no fourteen groups, your Honor. We submitted a list of documents under various headings for the convenience of counsel to tell them what information we had.

They wanted to know what we had, and they don't know about a lot of things, but they are not in documentary form. They don't know about a lot of things even now about this conspiracy that we will prove at the trial and which we have a right to.

59 We will give them—

By The Court: I will go over your pleadings again and your documents before me in the light of your argument. Of course, I am going to protect you on the law.

By Mr. Freeman: Your Honor, we suggest, we humbly suggest this memorandum should be completely reconsidered; that there should not be any final determination of relevancy and materiality.

By The Court: How did you offer them?

By Mr. Freeman: We didn't offer them.

By The Court: How did they come up on objection before me?

By Mr. Freeman: Your Honor, we had come before you for the purpose of setting this cause down for trial. You said—

By The Court: I asked you to do it.

By Mr. Freeman: Your Honor, you said—

By The Court: You asked me for a trial, and I said to Mr. Meserow and Judge Thompson, "Let's go to trial." Mr. Meserow said he wanted to take more depositions.

By Mr. Freeman: We appreciate that, but this is

60 over a year ago.

By The Court: I am sorry; I am talking about recently.

By Mr. Freeman: Over a year ago we came to your Honor and said we wanted to go to trial, and you said you couldn't. We presented our order denying a motion, our motion for trial setting, and in order to facilitate the trial date that we hoped would come soon, and Judge

Thompson submitted an order to me, and I am the sucker here, and said, "Let's have a list of documents. We can file objections. We will know where we are going," and I agreed to it.

I did, and I submitted this to you. You didn't consider the order. It was an agreed order, and your Honor said, "Well, it is nice to have agreement." The record so shows.

By The Court: I still would say that. I believe that if you pick out those documents you are talking about with such confidence as being relevant and material, admissible, and submit them to counsel, both as against interest or as material to the issues in the case, and they reject them, I will be very happy to sit with you and pass upon them item by item and do it intelligently.

61 By Mr. Freeman: We shouldn't be subjected to that before trial. This is something that has never been done.

By the Court: We do it in pre-trial every time.

By Mr. Freeman: I don't know of any such situation.

By the Court: How much can you agree on it? That is cutting the red tape.

By Mr. Freeman: We should not be subjected to rulings in advance of trial on materiality and relevancy.

By the Court: I will check the pleadings again. If I have done you an injustice, I will correct it. There is no question about it, in the light of your argument. I don't want to blanket you out.

By Mr. Freeman: We are now.

By the Court: I will check it again and see what is before me, more than your argument, and I will see what is before me on that motion.

By Mr. Freeman: Let me say one other thing and then I am through with my argument.

By the Court: I don't mean to cut you short. I will go with you until two o'clock if necessary.

62 By Mr. Freeman: I would like to call two items to your attention in view of your indulgence.

You have excluded all of the papers dealing with the house, the house purchased by Cross and the house sold by Cross, and this, we contend, goes beyond any objection that has been filed.

By the Court: If there are no objections to any of these documents, I shouldn't have ruled upon them.

By Mr. Thompson: There were.

By the Court: I will plead guilty. If there are documents before me which I included and to which there are no objections, it was an over-sight. It was inadvertence or a misunderstanding of the motion before me.

Can I go any further than that?

By Mr. Freeman: Your Honor, I have no further argument to make, but I just want to call this to your attention; that in connection with this house deal that Mr. Thompson, on pages 133 to 138 of the pre-trail hearing, and I just wanted you to have that notation, first said that the Court could rule on the house deal,
63 because there were no controverted facts and then went on to discuss all the controversies of facts there were and ended up by saying:

> "If Cross were the only defendant here, whether that would be admissible or not would be rather clear, that it might be admissions against Cross, if that became an issue as to whether or not he was coming to Chicago to go to work for Keeshin."

Judge Robson specifically asked Mr. Thompson the question:

> "In view of the fact there may be relevant and competent testimony that Cross was going to get a job, isn't there an area here to show that he was selling his home in Washington and that he had purchased a home to show that that intention was correct?"

Thompson answered it that way. In other words, to me, it seemed to me in pre-trial that that issue was conceded.

By the Court: Let me ask you a question naively. Suppose Mr. Cross has testified in depositions that
64 he has agreed — that he was offered and agreed to take a job, and would you need any more corroborative testimony about the house and about documents and memos on that, or would that be binding forever and a day upon the jury?

By Mr. Freeman: Cross denied it, but Keeshin conceded it. Johnston conceded it.

By the Court: I have not heard that denial from anybody. Keeshin admitted it.

By Mr. Freeman: Keeshin, Gurley, Johnston, Feucht on the house deal established it, and there is Cross' denial of that.

By the Court: You have not said he denied it.

By Mr. Freeman: I was giving you those elements of proof that establish it. Cross denied it, and therefore we had that problem, and we know —

By the Court: I don't mean to say that I knew about it. This is all new to me. This whole argument is new to me. When I ruled upon the documents, I merely ruled upon what you have in the confines of your papers, the pleadings here, nothing else.

By Mr. Freeman: Unfortunately, I say to your Honor with all due regard to my wothry opponents, you have
65 been misled, and you have been imposed upon and we have had the heart cut out of our case.

By the Court: If I have been misled — In the first place, I am not a surgeon, and I don't cut anybody's heart out, and secondly, I am going to follow the rules of evidence just as closely and as accurately as my best ability will permit.

By Mr. Freeman: Your reputation is strong in that direction. You have never been criticized—

By the Court: I will say to you now unequivocally that if any documents are made as admissions against anybody's interest on trial before me, they will go in.

If I have ruled against them, I never intended to.

By Mr. Freeman: In view of that statement, I think we should suspend this entire discussion and wait for trial.

By The Court: I don't think Judge Thompson or any other lawyers would ask me to keep out those kinds of admissions.

By Mr. Freeman: I think they would. They have, your Honor.

By the Court: Does anybody else want to argue?

66 By Mr. Freeman: Mr. McConnell would like to say a word.

By Mr. McConnell: I am not going to impose upon your Honor with any long arguments.

By the Court: This is my job and I am happy to hear you.

By Mr. McConnell: I have nothing to add to what Mr. Freeman has presented here, except I do want to reiterate really what your Honor has said.

We had a pre-trial hearing on this matter before Judge Robson, as your Honor knows.

By the Court: No, I don't know.

By Mr. McConnell: We spent a lot of time there.

By the Court: I get it now, but I didn't know anything about it.

By Mr. McConnell: We had a full transcript made of it and arguments pro and con on the different areas of proof.

By the Court: Was it ever reduced to writing?

By Mr. McConnell: Yes, it was, and I am going to read now from the transcript.

By the Court: All right.

By Mr. McConnell: I had argued before Judge
67 Robson.

By the Court: May I take a short cut with that?

By Mr. McConnell: Yes.

By the Court: I will have to read that and abide by it.

By Mr. McConnell: All right.

By the Court: And see if I agree in principle. If I find some error, I am not going to follow it, but I have to read it and at least be informed of what he heard and what he stipulated and agreed upon.

By Mr. McConnell: We assumed, of course, that would be so, because we had this hearing, and Judge Robson had committed himself as to how he was handling the matter.

The next I knew, the matter was transferred back to your Honor, and no further arguments were had, and no further discussions were had.

Here is what he said after I had argued in opposition to Judge Thompson's attempt here to cut this thing up into little segments, and so forth, and I said that was a characteristic way of handling an anti-trust suit
68 so you would lose the over-all view of the situation, and he said this:

> "I do not intend to break it up and try to rule on segments to break it up. What I am going to look at is a general effect of what my rulings will be on the over-all of this case, and if there are segments that enter into it, that I determine are not a part of it, it will be on the basis of looking at the pleadings, the issues that are joined and what I feel should be the scope of the trial."

Issues are made in this case on the pleadings which were filed, and that is significant here in this particular instance, because there was a very serious attack made

on these pleadings before Judge Sullivan, and there were extensive arguments and extensive briefs and Judge Sullivan overruled the objections to this complaint and held that it was a good complaint, and that the allegations were not subject to such an attack.

By the Court: I don't have that before me.

By Mr. McConnell: I just wanted to add this
69 to what has already been said.

In this complaint a large number of the allegations are taken up with the issue of Cross' participation in this conspiracy, and Cross, bear in mind, is not just named as a conspirator, but he is a defendant, and it is alleged he used his position on the Interstate Commerce Commission — and that is the allegation in the complaint — to induce the railroads to take the business away from Parmelee and to give it to Keeshin, and that is the very heart of the lawsuit.

I don't know how it came about, and I am not saying anything about your Honor's ruling or anything else, but those allegations, the proof which has to do with those allegations has all been excluded here by your Honor's order.

70 Further than that, there is the little paragraph in there that we can't even tender and offer the evidence which is in the complaint, which has been sustained against serious objection by another Judge of this same Court, and I just can't understand how we can be precluded from whole areas which have to do with Mr. Cross.

By The Court: That is precisely why I told Mr. Freeman I would be delighted to hear you in open court on the whole matter. Did I say that to you?

By Mr. Freeman: Yes.

By The Court: I always want to hear you in open court. If I made any mistake, I will correct it, if I made any mistake that was inadvertent or because I didn't understand the issues before me.

I didn't know that Judge Robson had had a pretrial and had gone into all of these matters. I want to check it and find out. It is difficult.

By Mr. McConnell: It is difficult, I know.

By The Court: It is the first time that I know of after twenty years on the bench of throwing to the Judge
71 fourteen bundles of records and documents and saying to him, "Do you agree or disagree with that area, with that type of proof?"

It is not intended that the Judge should examine each document and say, "That belongs in this area and this doesn't." It is up to you to bring it before me.

By Mr. McConnell: The law says you can't make a blanket offer of documents. You have to offer them individually.

By The Court: There is a perfect misunderstanding between you lawyers and not the Court, because the matter came before me on these documents, and I went into them because—exactly as these documents, I thought, required me to do.

If I am wrong on it, I will check Judge Robson's rulings or transcript, and I will hear Judge Thompson and Mr. Meserow for the next half hour or so.

By Mr. McConnell: If anybody wants to take any blame, give it all to me.

By The Court: I am taking the blame.

By Mr. McConnell: All I want is the right to offer evidence.

72 By The Court: These are the documents I am ruling upon, nothing else. I have nothing else before me. If I have to go further into it, I am going to go into it.

By Mr. McConnell: If we have a right to offer these documents at the trial, that is all I ask.

By The Court: I understand that, and they are saying, "No."

By Mr. McConnell: They are saying we can't offer documents at the trial which are in the pleadings.

By The Court: Judge Thompson.

By Mr. Thompson: If the Court please, we have been listening for an hour.

By The Court: I will give you all the time you want. I have a two o'clock jury matter, but I want to know what I have been listening to.

By Mr. Thompson: I am not surprised to know that you want to know what you have been listening to, because it has had nothing to do with the matter before you.

You have been listening for an hour or an hour and a half to a rehash of matters.

By The Court: I have practically been listening 73 to an argument before the jury on a conspiracy charge.

By Mr. Thompson: That is right, and now may we get to the subject at hand.

They were ordered by this Court, by an order tendered by us more than a year ago, in fact pretty near two years ago to file a list of documents they intended to offer in evidence, and the Court in its order said that if there are any objections to any of these documents, they should be presented ahead of the trial so that they might be disposed of.

By The Court: Who entered that order, Judge Robson?

By Mr. Freeman: No; that was the agreed order.

By Mr. Thompson: There is nothing agreed about it. I tendered the order, and your Honor entered it. Then after the order was entered, the documents were filed, a great mass of documents. In fact, they copied a list of all they had marked.

We filed a motion to strike the list as being an affront

to the Court and not in compliance with the Court's order and of no help to anybody because it wasn't asked that
74 we be furnished a list so we wouldn't be surprised at the trial.

It was perfectly obvious why we were asking for the list, and that was to sift out the few grains of wheat from all the chaff that they had marked.

Well, they didn't comply with it, and we moved to strike the whole list and have the Court order them to file an honest list of documents in compliance with the order.

Then when the matter was switched from your Honor to Judge Robson, we went before Judge Robson and he called a preliminary call, and he said that he wouldn't be able to act in any manner, but that we should have a pretrial hearing at such and such a time, which was well in advance.

We then decided that we should file a motion for pretrial rulings on categories of evidence, not pretrial rulings on these documents alone, but on categories of evidence, and we filed such a motion and asked for rulings that all the evidence, oral and documentary, in a certain category be excluded because it was either collateral to the issues or wholly irrelevant to the issues made by
75 the pleadings in this case.

That motion was presented, and we filed a brief in support of the motion in considerable detail.

They filed an answering brief to that brief of ours. We filed a reply brief, and then we had the pretrial hearing before Judge Robson.

It lasted all day. He made no rulings. The transcript of the pretrial hearing was—

By The Court You say he made no ruling?

By Mr. Thompson: I said he made no ruling.

By The Court: I said a while ago, was an order en-

tered, and I was told no, but I understand there was a ruling made.

By Mr. Freeman: Just a transcript.

By Mr. Thompson: I will tell you what it was if your Honor will wait just a moment. There was a pretrial hearing held, and the transcript was made of that hearing at Judge Robson's request.

Judge Robson, at the conclusion said, after having heard arguments on both sides, that he would like to have counsel for the plaintiff file a supplemental memorandum which would supplement the points which they had—which
76 had been discussed, but which they thought had not been fully covered or which they felt were still open questions and should be covered.

They filed a document which they called a supplemental memorandum which was nothing but a rehash of what they had already filed.

We filed a reply to that. There are five briefs which were all turned over to your Honor, should have been at least. They were in the file, and there was our brief in support of our motion for rulings on areas of evidence, oral and documentary, their answer, our reply, their supplement and our reply.

We came before your Honor after it came back before you and called your attention to the fact that there had been a pretrial hearing, and that there was a transcript, and asked your Honor for an order ordering it made a matter of record in this case and filed.

We did that purposely so your Honor would have it called to his attention and have it delivered to you by the clerk, and I assumed it was.

All those documents have been called to the Court's
77 attention by us. There hasn't been any question about it. The matter has been submitted to your Honor for

rulings, our formal motion for rulings, our brief supporting our motion for rulings.

All of this business they have been arguing, this jury speech you just heard, has been dealt with in the written briefs, and we have demonstrated there is a lot of hogwash and there is no connection between one item and another item of their alleged gigantic conspiracy.

It is their whole theory, apparently, that if they charge a conspiracy, that thereupon all contacts, conversations, suspicions and conjectures are admissible in evidence because a conspiracy has been charged.

That is utter nonsense, as your Honor well knows, and we have demonstrated that in our brief.

We also cited cases in our brief that it is not only right and proper but essential in the administration of justice, particularly in a case of this character, that the Court rule on areas of evidence and exclude areas of evi-
78 dence where there are no disputes of fact and where the issues are purely ones of law, or include them if he thinks they ought to be included.

There are no disputes of fact that the Interstate Commerce Commission as a Commission holds hearings, has millions of cases involving billions of dollars pending before it, that they do rule on these cases, and that decisions are made.

There are no issues of fact on any of that, so we moved that all evidence, oral and documentary, relating to proceedings and procedures before the Interstate Commerce Commission be excluded, and we briefed it and supported it with our brief, and they filed no answer that is worthy of recognition, just this flow that you heard this morning of a jury argument, which will fade into insignificance as compared with the flood that will be turned loose on the jury.

One of the things pending before the Commission at that time was the ex parte matter of refinancing the bond issue of the Baltimore and Ohio Railroad. Of course it involved millions upon millions of dollars.

79 It was in a favorable atmosphere for refinancing, at least they thought so, and subsequent events have proved it was much more than they could possibly have dreamed of, so they did refinance. There was no controversy. It was of no concern to the plaintiff in this case. It was no concern of any other railroad.

It is no concern of anybody excepting The Baltimore and Ohio Road and the public, and the public is represented by the Commerce Commission, and so it was perfectly proper and right that they have these discussions of the details respecting the issuance or carrying-out of the refinancing or the reorganization of the bond program.

Mr. Simpson happens to be president of The B. and O. Railroad. Mr. Simpson, of course, and his finance officers and his attorneys appeared before the Commission and talked with Hugh Cross, among others. It is perfectly proper that they should do so.

Mr. Simpson also had an inquiry from Hugh Cross as to what he knew about the transfer contract situation out

80 here in Chicago, and Mr. Simpson told him he didn't know anything about it, but he said, "I will find out and let you know what the status of it is," and he said he called up Mr. Cross and told him.

Cross was certainly entitled to be interested in this situation out here if he wanted to be, and it was perfectly proper and right that he should be, but, of course, it is all an evil that these two men who happen to be named defendants in this case should be having a conversation without any proof of any conspiracy existing.

They want that to be used as a suspicion.

That is one sample, and I am not going through all of this. I am not going to make any jury argument, because the jury isn't here, and I will save my speech for them.

The whole thing is dealt with in our briefs, and your Honor doesn't need to hear from us orally, and there we footnote every statement of fact we make, and every statement of fact is supported by the footnotes, and so I pass now to the motion that is before the court.

81 By The Court: That is what I would like to hear.

By Mr. Thompson: And one on which I think the court has ruled in part. In other words, we ask to have that category of evidence, which is all interstate commerce proceedings excluded because there is absolutely no testimony or evidence of any character and couldn't be that the Commerce Commission had anything to do with this transfer thing out here, and so it simply affords them the opportunity to raise a terrible boog-a-boo to be argued to the jury, and of course it can't know it was perfectly proper for Mr. Simpson to be talking with Mr. Cross in the matter of this ex parte proceeding, and they want it assumed, and they say in their briefs, and they make perfectly clear what they want to use this for, and they say The Baltimore and Ohio Railroad was saving itself $300,000,000 a year in interest as against saving itself $3,000 a year on the Chicago transfer contract.

That is the kind of argument they are going to make to the jury and, of course, it hasn't the slightest bearing on anything, and it would be vicious violation of the

82 most elementary principles of the administration of justice to allow any such foundation for any such argument.

We go the Senate investigation. The Senate investigation was an investigation of the conduct of Hugh Cross. No one else was a party to that investigation.

Hugh Cross was not permitted to be represented by counsel, of course, couldn't cross examine any witnesses, had nothing whatever to say about the course or conduct of any such inquisition, and he is sitting there with questions thrown at him from all sides by speeches made to him, not questions, but speeches made to him, and then he is supposed to say yes or no or try to crawl out from under the speech.

That sort of thing wouldn't be admissible if it had occurred in some court. No other court would respect it and would not admit it in evidence under any circumstances.

What we said was in our brief, and what is the law, and I don't need to advise your Honor that it is, because he
83 has already expressed himself, but if there is a statement which is an admission against interest by anyone who testified there, obviously it is admissible. Of course it is.

Also, if there is a statement of fact made by a witness which is contrary to a statement of fact made by that witness on the witness stand in this court, that may also be admitted, but under no circumstances can what Keeshin said or Johnston said or Feucht said before the Senate Committee be used, by reading the transcript, against Hugh Cross, nor can what Hugh Cross said be used against any of the other defendants.

It can only be used as an admission of that person, and he can't admit for anybody else, and it can only be used to contradict his testimony and can't be used to contradict somebody else.

By The Court: May I make my statement clear? It is against that person if it is material to the issues.

By Mr. Thompson: You have made it perfectly clear. All I am saying is we move to exclude from the jury's

84 hearing any reference to the Senate Committee investigation because the jury doesn't comprehend all of those things, and so we said that if the statements made there are to be used as admissions against interest or to be used for impeachment purposes, which are very limited, then they can be done by simply saying, "Were you on such and such a day in Washington, D.C., asked this question under oath and did you make this answer under oath?"

You don't need to ever mention, of course, that it is before the Senate Committee, and your Honor has consistently all through here ruled out every reference to the Senate Committee investigation which is thoroughly sound and can't be questioned, it seems to me, by anyone who want to be fair in the matter.

Then we come next to the category of the real estate dealings of Hugh Cross. Nobody who is a defendant in this case had the slightest connection with whether Hugh Cross sold his house in Washintgon and bought a house in Deerfield.

He was solely acting in a private capacity. There
85 is no indication that anybody knew anything about those transactions, and, of course, they are even conceding that in some situation they might be used as an admission against Cross of some character or other, and they could not possibly ever be used against anybody else.

It is not in furtherance of any conspiracy. It is not a part of any conspiracy, and it all occurred after the contract was let.

The contract was let on June 13, 1955, and if there was a conspiracy at any time it ended when the contract was let, of course.

Their whole theory is this contract started in March and ended in June on the 13th.

We ask to have excluded all of that because it is irrele-

vant to any issue in this case, and it proves nothing and doesn't even tend to prove anything as to whether there was a conspiracy back in March until June, when in July he buys this first piece of property, sells his own and buys this one.

This was, by the way, property belonging to his children in Washington, and the property was bought by his
86 children and the deed so shows. That has nothing to do with this lawsuit, and so we exclude that.

The next one is that when he got ready to sell this property, he sold it to a man who happened to be an employe of The Pennsylvania Railroad. The man and his wife were looking for property, and the evidence all shows, and there is no dispute about any of this, that the broker found this piece of property, among others, and showed it to them.

They said they wanted the property, and they bought the property, not even knowing who the owners of the property were.

They met Cross, but Cross didn't mean anything to them. They didn't know who Cross was, and they bought the property and drew the money out of the bank in Oak Park and paid for it in cash with their own money.

Those things are the facts. They prove nothing. They certainly don't prove that a conspiracy existed back from March until June, 1955, whereas this all occurred in 1956, and therefore if they can scream before the jury that here is one of the Pennsylvania employes who was under
87 the jurisdiction of Mr. Capri a vice president of The Pennsylvania Railroad, and so on, and so on, well, you can picture the screaming that will go on about that, whereas it will be a matter completely collateral to the issue and can serve no purpose except to prejudice all of these defendants, who knew nothing about it, had no connection with it of any kind or character.

We have asked to have those five areas of evidence excluded, and your Honor has excluded all of them by ruling that the documents are not admissible. That is a limited ruling your Honor made, because he was thinking of the objections to the documents and didn't have in mind the comprehensive motion that we made for these area rulings on evidence.

It is perfectly obvious, and I think your Honor is so right on those five that there is no point in arguing it any further. You have the briefs if you want to review them, but it seems to me it is so obvious that if your Honor's ruling that the documents should be excluded is sound, then, obviously, oral evidence on the same subject must be excluded or the ruling on the documents means absolutely nothing.

When you come to the next three categories, 6, 7 and 8, those are the categories which have to do with formalizing the contract with the transactions that took place in the turn-over of the business from Parmelee to the Keeshin service, and the performance by Keeshin of his contract.

It seems to me those are so obviously immaterial that I don't want to spend any time arguing it, and I don't think they will ever offer any documents on that category, notwithstanding the fact that they listed two or three thousand documents in that category.

You have overruled the objection, but you have said, of course, the objections may be re-presented at the time the documents may be presented for final ruling when your Honor gets the area of ruling.

On 9, 10 and 11 you also exclude categories. The No. 9 category is the matter of including through ticket this transfer charge which has been a subject of discussion for years and years and has nothing to do with this

lawsuit at all, and you have also excluded No. 10,
89 the meeting of the officers of the various official meetings of railroad executives, where there is no showing the subject was ever mentioned, and therefore, of course, simply a use of the idea that because an opportunity to do wrong existed, because two people happened to meet at a meeting, they certainly must have done wrong. That is just nonsense, too.

When you come to category 11, we ask you to exclude all the telephone call records that were not identified with this Chicago transfer business. Of course, if a witness is on the stand and he admits he had a telephone conversation — if Cross admits he had a telephone conversation with Keeshin and the transfer thing was discussed, the telephone record can be used for no purpose except to fix the time of the day and the date. It proves nothing by itself, and we ask to have it excluded only in the cases where there is no connection made whatever with the issues in this lawsuit.

We ask specifically for rulings. We made written requests for rulings, and they are all in our briefs, in
90 our motion, and we have prepared a formal order which we feel ought to be entered on the memorandum your Honor has already filed, and that formal order rules as you have ruled, in the areas where you have ruled so far as your rulings on documents are concerned.

What concerns us is that you say in your opinion the following:

> "My ruling on documents shall not be a ruling with respect to testimony on the same subjects, except the reason for this is that it is not before me now, and it may come before me on further proceedings."

It is before you now. You overlook the fact that our motion for rulings covered categories which covered both of them.

I don't think we need to go into the details of this evidence, because we have covered it all in our brief and have show the fallacy of it.

Just to show some illustrations, Mr. Morehouse testified positively that he was not sent over to the Union League Club to see Hugh Cross about this case, that he
didn't mention this case, that he knew nothing about
91 the transfer business, that he didn't mention it to
Cross and Cross didn't mention it to him, that he happened to see Cross at the Union League Club, and he talked to Cross about certain preliminary procedural matters that had to do with the rate division cases.

That was a case in which the railroads who were defendants in this case held opposite positions. The eastern railroads wanted one rate different, and the mid-continent railroads another and the Pacific, the mountain and Pacific railroads another, and so there was no consensus among the six railroad defendants or even among any other railroads as to what that order ought to be.

That case was then a fresh case, was in the very early proceedings of starting to get ready to be presented to the Commission.

It wasn't before the Commission in an active sense, and Mr. Morehouse was just asking him some procedural questions, so he testified and so Cross testified.

There was also pending before the Commission, the class rate, another kind of a rate case which was then
pending before the Commission and which was sub-
92 sequently argued before the Commission.

Mr. Morehouse and Cross both say that matter was not mentioned at all at that meeting, and I used that only as an illustration to show you in our brief we have exploded all of this gigantic conspiracy of theirs, and we will take care of that when we come to the trial.

These areas of evidence we have to know before the

trial, and the courts have held it is proper that we should know whether we have to meet this question of the Interstate Commerce Commission proceedings.

Do we have to prove that Cross and his associates decided correctly every time they decided a case in which these railroads were interested, or do we have to prove they decided incorrectly, and if they decided incorrectly, did Cross participate one way or the other?

Of course, that would just be endless and it would be utter nonsense. There can be no presumption that a public official having a problem of making decisions in human affairs, which includes all our judges, all our commissioners, all our executives, that they are
93 crooked just because they have big matters before them.

The presumption is that they are honest, and they have proven absolutely nothing to indicate there was anything wrong with any proceeding down there, and so that being true, we have to know whether that is going to be opened up or not, and we have covered that fully in our briefs, and I don't want to spend any more time on it.

We also have to know whether or not we have to face the prejudice and bias of this Senate Committee investigation and be subjected to the results of an investigation of that character which has no limitations, no regulations, no protection of any kind of character, and particularly are we to be convicted because the prosecutor of the Senate Committee wrote a report which nobody ever saw until they published it in the Senate proceedings, in which they said Mr. Cross was indiscreet, and this and that and so on?

It doesn't even find Cross guilty of being in a conspiracy with the railroads out here. It says nothing about the issue in this case, and certainly, it says nothing
94 about all the rest of the defendants, but it says right in the report that it rests upon information that their

agents have picked up around the country, hearsay on hearsay, and, of course, we have to know whether or not we are going to be faced with that sort of trash in this case.

Then you come to the Cross deals, the real estate deals which are covered by 3 and 4 of this motion of ours. If those are to be received, we have to get all of the testimony that has to do with when Cross tried to sell his property.

The evidence shows in this case that he had been trying to sell it for several years. It was a bulky property he didn't want after his children had gone. The children had both married and gone, and they didn't need the big house they had in Washington or outside of Washington there, and so that is an issue.

What would the jury decide after they heard all of this evidence? It would take a day or two to try that issue as to whether or not Cross sold his property honestly in Washington and bought the property honestly in Deerfield.

95 After we got all through with it and the jury decided no, that he was wrong with that, that he shouldn't have done that, what does it decide in this case? It doesn't prove there is any conspiracy. It doesn't tend to prove there is none, and it would be smearing other defendants who had nothing to do with it.

We have to know whether the transaction at Carrolton, Illinois, is to be gone into, because there, of course, we have involved a number of issues which have nothing to do with this lawsuit.

There is no testimony, not even a suspicion that it has anything to do with the Chicago transfer contract, except the identity of names.

Then, of course, you take the telephone records. Their

whole argument is that if I call up the secretary of the Governor of Illinois today and talk to him and the telephone record shows I talked to him for ten minutes, and then I call up some fellow who is in the penitentiary, and I talk to him for a few minutes on the same day, and then I call my friend, a Congressman down in Washington and talk to him on the same day or the next
96 day, and then later it appears this friend in Washington was a friend of the fellow who was in the penitentiary and the matter was going to come up before the Governor as to whether he should be pardoned, so a gigantic conspiracy finally develops, and because three or four of us talked on the same day or within two or three days in succession, obviously we must have been engaged in a conspiracy.

Of course, that is so silly there is no use talking about it any further. We cover that in our brief.

I hand to your Honor the formal order which I should like to have the court enter and which will rule on the three categories that are before the court and which are the matters that the court is asked to rule upon.

That is all I have to say. Thank you, your Honor.

By Mr. McConnell: I will take about two minutes, your Honor. Judge Thompson disposed of our position on our case as being hogwash and nonsense, and all of that. That isn't going to fool this Court.

97 This is a serious lawsuit, and I think everybody recognizes that. If he doesn't recognize it yet, he will before he gets through.

He wants to know what the issues in this case are. He has been practicing law longer than I have, and I have been practicing law thirty-five years, and if I want to know what the issues in the case are, I go and look at the pleadings, and that is where I find out what the issues are, and that is where I am asking your Honor

to go to find out what the issues are in this case, and the question is whether we can prove issues made in the pleadings with evidence which is competent.

How can you say that evidence which tends to support allegations in a complaint is immaterial or irrelevant? I never heard of such an argument in my life that you can take a complaint which has been subject to every attack this lawyer can think of and has been sustained by this court, and then come in and say we can carve out every bit of evidence that has to do with every allegation about Mr. Cross.

I can understand why these railroads want to get us as far away from Mr. Cross or any evidence concerned with Mr. Cross as they possibly can. It is not hard to understand it.

You have heard what Mr. Freeman's analysis of some of that evidence was. The charge in the complaint and the charge to be made at the trial is that Mr. Cross did betray his trust, that he did betray his position on the Interstate Commerce Commission, and that he used that position in order to induce railroads who were doing business with that Commission to deal with Mr. Keeshin instead of with Parmelee.

That is what we allege. That is what this lawsuit is about, and we have a right to prove it.

I say that with all due deference to your Honor, that whether you do it under the guise of ruling on evidence or excluding issues or categories or whatnot, that is the issue in this lawsuit, and we have a right to try it before a jury, and we have a right to try it without the pronouncements of Judge Thompson as to whether or not it is hogwash or nonsense or this or that or the other thing.

99 It is a serious lawsuit, and we are here attempting to prove it, and all I am asking of your Honor is the

right we have in every lawsuit in this building, to produce our evidence in support of our allegations.

On page 16 of this complaint it is alleged, and it is denied, and it is an issue in this case:

> "Prior to November 23, 1955, defendant Cross did exercise his power as a member and as chairman of the Commission in favor of other defendants in matters pending before and subjects over which the Commission had supervision. On November 23, 1955, defendant Cross resigned his position as chairman of the Commission as a result of an investigation of his conduct by the United States Senate Committee on Government Operations, Permanent Subcommittee on Investigations and prior to the announced institution of public hearings by said subcommittee. Said resignation was for the purpose of concealing the terms of the conspiracy."

100 We allege it. We have a right to prove allegations in a complaint. That is elementary. That is where you start with lawsuits. You don't start anywhere else, except in the pleadings, and I have never heard of any court saying that evidence which was material on an issue pleaded and denied and an issue in a case was irrelevant and immaterial.

By the Court: Nobody is arguing the right of the plaintiff to prove a conspiracy.

By Mr. McConnell: This allegation was attacked and denied.

By the Court: Nobody can deny you that privilege. All we are arguing about is what is proper under those allegations and nothing else. I don't care whether Mr. Freeman calls it paralyzing the plaintiff, and I am saying that respectfully, or whether Judge Thompson says hogwash.

I am here to determine the question of how to be fair

to both sides and how to let you prove your conspiracy within the bounds of the law and how to exclude testimony beyond the pale.

By Mr. McConnell: And I say we are entitled to introduce the evidence.

101 By the Court: You may say that, and I may disagree with you. I may agree in part and disagree in other points. All I can say to you now is you will have a chance to legally prove a conspiracy within the confines off all the rules of evidence.

By Mr. Freeman: Is your Honor disposed to give us another time when you will want to consider this?

By the Court: I want to familiarize myself with that transcript, and I want to know much more than I have known before, and I will notify counsel when I am ready to decide it.

Let me ask you a question. How soon will you be ready to go to trial? You asked me for more time.

By Mr. Meserow: We are ready to go to trial, your Honor. Again, depending on what your final ruling is here, we may want to take some depositions, because we do have a counterclaim pending, but that will not delay the trial.

By the Court: Depositions on what, so we will know what counterclaim you are talking about that is affected by this?

102 By Mr. Freeman: He charges the City Council was corrupted by us.

By the Court: Is that before me also and before the same jury?

By Mr. Meserow: That is an answer and counterclaim in this case.

By the Court: What does that have to do with my ruling here?

By Mr. Meserow: Nothing.

By the Court: Why don't you go ahead up to now and get ready? I presumed when you mentioned depositions that we couldn't go on without those depositions. Maybe we can't, but they have nothing to do with my ruling here.

I will try to expedite this matter as early as possible. I will notify you, and I will give you a date for trial.

By Mr. McConnell: On the date for trial, if your Honor please, I have a trial before Judge Adesko.

By the Court: I will hear you at that time to the convenience of all parties.

By Mr. McConnell: I have a trial which is now set before Judge Adesko which the parties and the court 103 have made a firm date on, and that involves the Estate of Eugene McDonald and his widow's attack on that estate.

That case is going to take six weeks to try starting February 1st.

By Mr. Freeman: Any time thereafter.

By Mr. McConnell: I can't try this case during that time.

By the Court: I will see to it that you will not be interfered with or imposed upon from making a real fee in the other case also. I have seen the papers about this, and I know how important it is.

By Mr. Thompson: Let's have the understanding it will be somewhere around April 1st.

By the Court: It will be somewhere around that time, if it is convenient to all parties.

By Mr. Freeman: It is.

104 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

CERTIFICATE

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 103 is a full, true and accurate transcript of the original shorthand notes of all the proceedings had upon the hearing of the above-entitled cause, on January 6, 1960, before the Honorable Julius H. Miner, Judge of said Court.

/s/ Roy E. Fuller
Roy E. Fuller
Official Court Reporter—
United States District Court
Northern District of Illinois

January 6, 1960
732

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

MEMORANDUM ON DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S LIST OF DOCUMENTS AND IN THE ALTERNATIVE FOR PRE-TRIAL RULINGS

On August 1, 1958, this Court entered a pre-trial Order to the effect that the parties shall exchange lists of documents they respectively intended to offer into evidence at the trial of the case, and that objections to the admissibility of any documents on the said lists should be raised by a certain date for argument and ruling before trial.

Both parties have filed objections to certain of the documents referred to by the list submitted by the other. Objections by the plaintiff, however, are not before the Court at this time.

The instant motion of the defendant railroads and railroad presidents was filed on June 30, 1959. It is described as one "to Strike Plaintiff's List of Documents and In the Alternative For Pre-Trial Rulings". The motion has also been adopted by the remaining defendants, Keeshin, Railroad Transfer Service, Inc., and Hugh W. Cross.

The motion to strike plaintiff's entire list of documents is denied. The Court is of the opinion that when counsel submit to the Court a list of documents which they state they intend to offer into evidence at the trial of the cause, their actual intent is presumed to be the same. Absent competent evidence to the contrary, this Court will not question counsel's motives or intentions.

The items on "Plaintiff's List of Documents," filed September 25, 1958, to which the defendants object and the grounds for defendants' objections, are generally identified in defendants' Motion as follows:

1. Items 83-94, on grounds that they are irrelevant, immaterial and prejudicial.
2. Items 19 and 20, on grounds that they are irrelevant, immaterial and prejudicial.
3. Items 1, 22-29, 31-33 (except LaSalle Exhibits 0-11b), on grounds that they are collateral to the the issues raised by the pleadings and immaterial.

733

4. Items 30 and LaSalle Exhibits 10-11B in 33, on grounds that they are collateral to the issues and immaterial.
5. Items 50-56 as irrelevant and immaterial.
6. Items concerning the negotiation of the contract after the award of the contract on June 13, 1955, as immaterial.
7. Items relating to change-over of the transfer service from plaintiff to Railroad Transfer Service.

Inc., after award of the contract on June 13, 1955, as immaterial.

8. Items concerning the operation of the transfer service by Railroad Transfer Service, Inc., after Oct. 1, 1955, as irrelevant and immaterial.
9. Items relating to proposals that a terminal transfer charge be passed on to passengers, as irrelevant and immaterial.
10. Evidence concerning attendance by defendants or employees of defendant railroads at meetings, as irrelevant and immaterial.
11. Items consisting of telephone company records of telephone calls unless evidence is presented identifying the calls with the subject matter of the suit.

The Court has examined the parties' descriptions of each Item and of the exhibits included in each Item, to the admissibility of which the defendants object. Defendants, by their Objections and Motion, object to a substantial number of the plaintiff's proposed documentary exhibits. The Court has carefully considered all objections to the admissibility of documents referred to on plaintiff's list, all briefs, and all arguments of the parties in support of their respective positions.

The rulings hereinbelow set forth concerning admissibility of *documents* are not intended to control as to, nor may the parties assert these rulings as controlling on, evidentiary questions relating to *testimony*. Although the rulings herein are capable of being construed as indicating the Court's position on the issues to be tried in the case and the relevancy or materiality of certain facts to the issues or the testimony. It may be that such limitation may be appropriate, but that will await further proceedings and argument specifically directed to that end.

All documents the objections to which are here overruled

are rendered not inadmissible only to the extent that the Court will permit plaintiff to tender them for admis-
734 sion into evidence at the time of trial. Documents here ruled inadmissible may not be so tendered at the trial. Whether any document, not by these rulings rendered inadmissible, will be admitted into evidence at the trial is a question reserved by the Court for ruling at the time of its tender by plaintiff at the trial.

Any document to which defendants's objections are here sustained may, upon approval by the Court, become admissible, notwithstanding, only for purposes of impeachment, and then only to prove the inaccuracy of specific facts testified to on direct examination, in which case the document herein ruled inadmissible may be admitted into evidence if it patently and explicitly, not as a matter of inference or implication, states the fact concerning which the direct testimony is being controverted.

PLAINTIFF'S ITEMS NUMBERED

1, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33—Documents concerning 1955 sale of Mr. Cross' Maryland residence and purchase by him of Deerfield, Illinois, residence in July, 1955. *Objection sustained.*

30, 33—Documents concerning 1956 sale of Deerfield residence by children of defendant Cross to an employee of Pennsylvania Railroad. *Objection sustained.*

2, 37—Documents consisting of telegram from Johnston, President of Illinois Central, to Mr. Cross; Mr. Johnston's diary and appointment sheets. *Objection sustained.*

3—Telephone company records of Baltimore & Ohio toll charges. *Objection sustained.*

4—Documents consisting of affidavits of and a letter from Mr. Simpson to the Senate Committee on Investigations; a letter from Baltimore & Ohio counsel to Washington counsel concerning Mr. Simpson's appearance before

the Committee; Mr. Simpson's appointment book; Mr. Simpson's secretary's appointment book; Senate Committee subpoena to Mr. Simpson; and Subpoena duces tecum to Mr. Simpson in this case. *Objection sustained.*

5, 6, 7, 8, 9, 13—Documents consisting of Mr. Whittington's 1955 appointment book; transcript of proceedings of American Association of Passenger Officers; hotel registration records concerning his visits to New York and Atlantic City; transmittal letter from counsel. *Objection sustained.*

735 10—Documents referring to "complimentary letter" to Mr. Holt for his work as chairman of committee handling Chicago transfer problem; conferences and correspondence with I.C.C. commissioners concerning cleaning of freight cars.

Carpi Exhibits 2 and 4—*Objection overruled. Remainder of objection sustained.*

11—Documents concerning composition of Executive Committee of Eastern Railroad Presidents Conference in 1955, and attendance at meetings. *Objection sustained.*

12, 14, 15, 39—New York Telephone Company records concerning Mr. Forgash's and United States Freight Company calls and telegrams; records of Washington and Chicago hotels showing Mr. Forgash's visits. *Objection sustained,* except Forgash Exhibit 1, to which no objection has been made.

16, 17—Documents concerning United States official toll calls; Illinois Commerce Commission tickets showing toll calls by Mr. Cross; Illinois Commerce Commission bulletin on toll calls; Mr. Cross' travel vouchers to Commission. *Objection sustained,* except Ryan Exhibit 1, to which no objection has been made.

18—Appointment book of Mr. Perlman, New York Central President. *Objection sustained.*

19, 20—Printed transcript of hearings before Senate

Committee involving Mr. Cross. *Objection sustained.*

21—Union League Club of Chicago records showing Mr. Cross' visits. *Objection sustained.*

34—Chicago Athletic Association records and pages from magazine concerning parties by Mr. Ben Regan. *Objection sustained,* except Chicago Athletic Association Exhibit 1, to which no objection has been made.

35—Document concerning Parmelee charges paid by each of Chicago terminal lines when Parmelee was transfer agent. *Objection overruled.*

36—Documents concerning transfer contract negotiations. *Objection overruled.*

38—Illinois Bell Telephone Company records concerning calls charged to defendant Keeshin. *Objection sustained.*

40—Letter from Mr. Fawcett of New York Central and Mr. Jenks of Rock Island to Parmelee, and others. *Objection overruled.*

736

41—Le Seuer Exhibit 1. Mimeographed letter. *Objection overruled.*

L.S. 2. Excerpts from report on June 3, 1955 meeting. *Objection overruled.*

L.S. 3-4. Correspondence concerning Nickel Plate contract with Parmelee. *Objection overruled.*

L.S. 5. Internal Nickel Plate memorandum. *Objection overruled.*

L.S. 6. Letter concerning transfer of passengers at Englewood Station. *Objection overruled.*

L.S. 7. Notes made after termination of Parmelee Service, containing a reference to the Senate investigation. *Objection overruled.*

42—Affidavits of Mr. Gurley (Santa Fe President) furnished to Senate Committee. *Objection sustained.*

43—Soo Line memoranda. *Objection overruled.*

44—Keeshin Exhibits 1-5. Subpoenas and telegrams re Senate Committee. *Objection sustained.*

K. 8. Confirmation from Litsinger of purchase of vehicles by Keeshin. *Objection overruled.*

K. 9. Concerns operations after October 1, 1955. *Objection overruled.*

K. 15-A. *Objection overruled.*

K. 16-16C. *Objection overruled.*

K. 17-17B. *Objection overruled.*

K. 20. *Objection overruled.*

K. 21. June 15, 1955, memorandum, Keeshin to Baxter, re preparation for take-over. *Objection overruled.*

K. 22. Anonymous letter. *Objection sustained,* on defendants' representation that letter is anonymous.

K. 23. Keeshin memorandum. *Objection overruled.*

K. 24. Letter, Litsinger to Keeshin. *Objection overruled.*

K. 25-26. Communications, Litsinger to Senate Committee. *Objection sustained.*

K. 27. Sale contract, Fruehauf Trailer to Railroad Transfer. *Objection overruled.*

K. 28. November 4, 1955, Railroad Transfer Service Memorandum. *Objection overruled.*

K. 29-30D, 32-32B. Communications re formalizing contract between Railroad Transfer Service and Chicago Terminal Lines. *Objection overruled.*

K. 31-31A. Re pickup and delivery rates. *Objection overruled.*

737

K. 33-35. Memoranda Baxter to Keeshin, respecting C. A. Conklin Truck Line, Inc. operations. *Objection overruled.*

K. 36. Order of Illinois Commerce Commission concerning Conklin. *Objection sustained.*

K. 37-37C. Keeshin memoranda. *Objection overruled.*

K. 38. June 21, 1955, Keeshin memoranda. *Objection overruled.*

K. 39. Re formalizing Railroad Transfer Service-Conklin Truck Line contract. *Objection overruled.*

K. 40-40A. Notes. *Objection overruled.*

K. 41-41B. Memorandum, Kazanow to Keeshin. *Objection overruled.*

K. 42, 43, 44, 45. Letters re labor relations and labor contracts concerning Railroad Transfer Service employees. *Objection overruled.*

K. 46-50. Documents relating to equipment purchases by Railroad Transfer Service award of contract. *Objection overruled.*

K. 51. Documents re baggage pickup and delivery service charges by Railroad Transfer Service. *Objection overruled.*

K. 52, 53, 56. Correspondence with interstate Commerce Commission re Conklin. *Objection sustained.*

K. 54, 55. Keeshin memoranda. *Objection overruled.*

K. 57, 58. Baxter memoranda re meetings between Keeshin and committee of six on May 19 and June 3, 1955. *Objection overruled.*

K. 59. Printed wage contract. *Objection overruled.*

K.60-61. Documents concerning transactions between Keeshin and Marshall Field in summer of 1955. *Objection overruled.*

K. 62. Tabulation of dollar amounts of transactions between Truck Rail Terminal Inc. and certain Chicago terminal lines. *Objection overruled.*

45, 46, 47—Applications for certificates of title filed by Railroad Transfer Service with Secretary of State. *Objection sustained.*

48—Letter Mr. Goldstein to Mayor Daley, dated September 24, 1955. *Objection overruled.*

49—Annual reports of defendant railroads to stockholders for 1954 and 1955. *Objection overruled.*

50, 51, 52, 53, 54, 55, 56—Documents relating to transactions of Carrollton Farm Supply Co. and son of defendant Cross. *Objection sustained.*

57—Santa Fe Exhibits 1-3. Senate Committee telegrams and subpoena to Mr. Gurley. *Objection sustained.*

S.F. 4-9. Re matters after Railroad Transfer Service take-over of service on October 1, 1955. *Ob-*
738 *jection overruled.*

S.F. 10. Memo, Duffy to Gurley. *Objection overruled.*

S.F. 29-36. Re formalizing contract between Railroad Transfer Service and Conklin Truck Line. *Objection overruled.*

S.F. 37-85. Memoranda and notes. *Objection overruled.*

S.F. 90-94. Re proposed terminal charge to cover transfer service. *Objection sustained.*

S.F. 95-99. Memoranda. *Objection overruled.*

S.F. 100-124. Re matters after take-over on October 1, 1955. *Objection overruled.*

58—Baltimore & Ohio Exhibits 1-12. June and July 1955, memoranda. *Objection overruled.*

B & O 13, 14. Memorandum re June 13, 1955, meeting. *Objection overruled.*

B & O 15-17. 1933 correspondence. *Objection overruled.*

B & O 18-20. Memorandum on June 3, 1955, meeting. *Objection overruled.*

B & O 21-22. Memorandum on June 2, 1955, equipment inspection. *Objection overruled.*

B & O 23-25. Memoranda. *Objection overruled.*

B & O 26-32. Parmelee annual report. *Objection overruled.*

B & O 33-42. Dunn & Bradstreet report on Keeshin. *Objection overruled.*

B & O 43-70. Memoranda. *Objection overruled.*

B & O 71-76. Re matters during take-over. *Objection overruled.*

B & O 79-102. Notes and memoranda. *Objection overruled.*

B & O 106-117. Notes and memoranda. *Objection overruled.*

B & O 118-147. Re procedures after take-over. *Objection overruled.*

B & O 148-149. Memoranda. *Objection overruled.*

B & O 150-151. Re matters on take-over. *Objection overruled.*

B & O 152. Draft of a press release. *Objection overruled.*

B & O 153-157. Memoranda. *Objection overruled.*

B & O 158-178. Formal Railroad Transfer Service Inc. agreement of Octover 1, 1955. *Objection overruled.*

B & O 179-190. Memoranda of September, 1955, re matters connected with take-over. *Objection overruled.*

B & O 191-209. Re formalizing contract. *Objection overruled.*

B & O 210-214. August, 1955 notes and memoranda re routine of take-over. *Objection overruled.*

B & O 215. Memorandum re Parmelee labor problems. *Objection overruled.*

B & O 282-294. Re matters after take-over. *Objection overruled.*

739

9—Northwestern Railway Exhibits 1-4. Memorandum Brennan to Feucht reviewing history of negotiations and considerations re changing from Parmelee to Railroad Transfer. *Objection overruled.*

N.W. 5-7. *Objection sustained* on defendants' representation that documents relate to Senate Committee Investigation.

N.W. 8, 16. Memorandum by Feucht reporting phone call with Cross. *Objection overruled.*

N.W. 9. Memorandum. *Objection overruled.*

N.W. 10. Clipping from Chicago Tribune. *Objection sustained.*

N.W. 11-15, 16A-17, 21-22, 24-25. Memoranda Small to Feucht. *Objection overruled.*

N.W. 48-53. February, 1946, report re investigation of Parmelee charges. *Objection overruled.*

N.W. 61-63. Report Small to Feucht on June 13 meeting. *Objection overruled.*

N.W. 64. Memorandum Brennan to Norton. *Objection overruled.*

N.W. 68-69. Memorandum Small to Feucht. *Objection overruled.*

N.W. 70-74. Memorandum Brennan to Small. *Objection overruled.*

N.W. 75 and 141. Copies Feucht memoranda of Cross conversation. *Objection overruled.*

N.W. 76-78. Memoranda. *Objection overruled.*

N.W. 79. Memorandum Small to Feucht. *Objection overruled.*

N.W. 80, 81, 83, 88, 90-97. Memoranda. *Objection overruled.*

N.W. 82, 87, 90. Memoranda Small to Feucht. *Objection overruled,* subject to examination.

N.W. 130-140. Memoranda. *Objection overruled.*

N.W. 142, 143, 146. Memoranda. *Objection overruled.*

N.W. 147. Memorandum Small to Feucht. *Objection overruled.*

N.W. 148-157. Memoranda. *Objection overruled.*

N.W. 161. May 25, 1955, telegram Cross to Feucht. *Objection overruled.*

N.W. 162. Re formalizing contract. *Objection overruled.*

N.W. 163-164. Re take-over procedures. *Objection overruled.*

N.W. 165. Re matters after take-over. *Objection overruled.*

N.W. 166. June 3, 1955, report Brennan to Norton. *Objection overruled.*

N.W. 167-197. Report Winkler and Padrick to railroad representatives. *Objection overruled.*

N.W. 198-199. Letter Seddal to Mayor Daley. *Objection overruled.*

N.W. 200. Communication Padrick to negotiating committee. *Objection overruled.*

N.W. 201-202. Letter Padrick to Chicago vehicle commissioner. *Objection overruled.*

740

N.W. 203-208. Re procedures on take-over. *Objection overruled.*

N.W. 220-222. Memoranda and notes. *Objections overruled.*

N.W. 224-288. Re matters after take-over. *Objection overruled.*

N.W. 289-291B. Re change-over matters. *Objection overruled.*

N.W. 292-319. Re matters following take-over. *Objection overruled.*

N.W. 320-327. Memorandum on Parmelee service history. *Objection overruled.*

N.W. 328. Memorandum Brennan to Poulson. *Objection overruled.*

N.W. 329-335. Re baggage reports in March, 1954. *Objection overruled.*

N.W. 336. Re matters after take-over. *Objection overruled.*

N.W. 337-355. Memoranda and notes. *Objection overruled.*

N.W. 356-369. Re operations after take-over. *Objection overruled.*

60—Pennsylvania Railroad Exhibits 4-5. Memorandum on release of news of awarding of contract to Railroad Transfer. *Objection overruled.*

P 17-25, 27. Memoranda. *Objection overruled.*

P 26, 29-34, 36. Re matters after take-over. *Objection overruled.*

P 35. Note. *Objection overruled.*

P. 37. Memorandum on take-over. *Objection overruled.*

P 38-61. Memoranda. *Objection overruled.*

P 43A. Clipping from Chicago Daily News. *Objection sustained.*

P 62-66. Re matters after October 1, 1955. *Objection overruled.*

61—Illinois Central Exhibits J 1-3. Memoranda Trovillion to Johnston. *Objection overruled.*

I.C. 13-14. Memorandum re take-over. *Objection overruled.*

I.C. 15-27. Memoranda. *Objection overruled.*

I.C. 28-29. Notes re June 3, 1955, phone conversations. *Objection overruled.*

I.C. 29a and 29b. Notes made at June 3 meeting. *Objection overruled.*

I.C. 31, 38-41. Memoranda. *Objection overruled.*

I.C. 44. Copy of news item on labor wage agreement. *Objection sustained.*

I.C. 45-47, 52-55, 60. Memoranda. *Objection overruled.*

I.C. 61. Copy letter Padrick to Keeshin. *Objection overruled.*

I.C. 63-72. Memoranda. *Objection overruled.*

I.C. 73. Letter relative to settlement of alleged Parmelee deficit in 1954. *Objection overruled.*

741

I.C. 74-79. Memoranda. *Objection overruled.*

I.C. 80-108. Re matters after October 1, 1955. *Objection overruled.*

I.C. 109. Letter re interpretation of a clause of the Railroad Transfer agreement. *Objection overruled.*

I.C. 110. Memorandum on take-over of service. *Objection overruled.*

I.C. 112. Memorandum on giving service if Railroad Transfer service is interrupted. *Objection overruled.*

I.C. 113. Memorandum re take-over. *Objection overruled.*

I.C. 114-153. Re formalizing of agreement. *Objection overruled.*

I.C. 154-156. Memoranda. *Objection overruled.*

I.C. 157. Copy of communication by Parmelee to its employees. *Objection overruled.*

I.C. 158-166. Memoranda. *Objection overruled.*

I.C. 167. Memoranda. *Objection overruled.*

I.C. 168-196. Re matters after October 1, 1955. *Objection overruled.*

I.C. 197-198. Copy of Padrick letter to Chicago Vehicle Commissioner. *Objection overruled.*

I.C. 199-200, 202. Re routine after take-over. *Objection overruled.*

I.C. 201, 203. Re routine during take-over. *Objection overruled.*

I.C. 204. Re routine of Parmelee service. *Objection overruled.*

I.C. 205-208. Notes. *Objection overruled.*

62—New York Central Exhibit 2. Tribune news article on change of transfer service. *Objection sustained.*

N.Y.C. 1. Memo transmitting Exhibit 2. *Objection sustained.*

N.Y.C. 3-4. Published baggage tariff. *Objection overruled.*

N.Y.C. 6, 37-44, 49-58, 63, 68-72, 90-92, 192, 228-232, 251, 256, 263, 265-267, 313, 340-341. Memoranda. *Objection overruled.*

N.Y.C. 9-10, 11-15, 16-20, 21-22, 25, 27, 47, 49, 79, 149. Re change-over from Parmelee to Railroad Transfer Service. *Objection overruled.*

N.Y.C. 23, 24, 28-34. Re formalizing contract. Objection *overruled.*

N.Y.C. 26-35, 48, 59-62, 64, 93, 150-151, 160-161, 172, 176-185, 202, 203-205, 327-329, 342. Re routine of Parmelee operations. *Objection overruled.*

N.Y.C. 36. Daily News item re change of service. *Objection sustained.*

N.Y.C. 45, 46, 221-227, 275, 297-299, 304, 316, 323. Memoranda. *Objection overruled.*

N.Y.C. 73-76, 145-148, 193-201, 233-236, 343-345, 349-352. Re matters after take-over. *Objection overruled.*

N.Y.C. 77-78. Re 1940-41 proceedings. *Objection overruled.*

N.Y.C. 80-87. Transportation notice of May 26, 1955, and correspondence re group movements of Boston Red Sox. *Objection overruled.*

742 N.Y.C. 94-134. Notes of Bone re meetings of sub-committee of six railroads, not from New York Central files. *Objection overruled.*

N.Y.C. 162-171, 317-322. Re proposed transfer charge to be included in through ticket charge. *Objection sustained.*

N.Y.C. 237-242, 300-302. Re Senate Committee investigation of Cross. *Objection sustained.*

N.Y.C. 243-248, 249-250, 252-253, 264, 277-283, 346. Notes and memoranda. *Objection overruled.*

N.Y.C. 285-296. Correspondence and memoranda re 1951 study of transfer service. *Objection overruled.*

N.Y.C. 277-282 (second set). Re Chicago transfer proposals of May 20 to June 20, 1955, and recommendations. *Objection overruled.*

N.Y.C. 283-284 (second set). Duplication of N.Y.C. 68-69. *Objection overruled.*

N.Y.C. 285-289 (second set). Memoranda re Parmelee operations. *Objection overruled.*

N.Y.C. 290-295. 1956 memoranda and correspondence. *Objection overruled.*

N.Y.C. 296-297. Memoranda. *Objection overruled.*

N.Y.C. 298. Chicago Tribune article. *Objection sustained.*

N.Y.C. 299. Chicago Daily News article. *Objection sustained.*

N.Y.C. 300-303. Re routine of change-over of service. *Objection overruled.*

N.Y.C. 186-188, 265-266, 307, 308-309, 310-312, 314, 315, 324-326, 330-332, 333, 334, 335-337, 347, 348, 349. Documents objected to under other numbers. Rulings as for the lower numbered duplicate items.

63—Western Passenger Association Exhibits 2-5, 12. Proceedings of meetings of Chicago terminal lines re proposed Chicago terminal transfer charge to be included in through-ticket charge. *Objection sustained.*

W.P.A. 8. Proceedings of Chicago terminal lines, including references to Parmelee coupon rates. *Objection overruled.*

W.P.A. 71-78, 121-124, 127. Re matters subsequent to take-over. *Objection overruled.*

W.P.A. 152-153. Re negotiations for formalizing contract. *Objection overruled.*

W.P.A. 185-186, 189, 191-193. Re matters subsequent to take-over. *Objection overruled.*

W.P.A. 195. Re terminal charge proposal. *Objection sustained.*

W.P.A. 196-204. Re change-over matters. *Objection overruled.*

W.P.A. 205-208. Re matters after take-over. *Objection overruled.*

W.P.A. 209. Re matters on change-over. *Objection overruled.*

W.P.A. 210-211. Re adjusting Parmelee charges on transfer of the remains. *Objection overruled.*

W.P.A. 215-225, 229. Re matters after take-over. *Objection overruled.*

W.P.A. 226, 230. Re matters on change-over. *Objection overruled.*

W.P.A. 232-236. Re matters after take-over. *Objection overruled.*

W.P.A. 237-243. Re matters of change-over. *Objection overruled.*

W.P.A. 245-246, 248-249. Re accounting on transfer of remains. *Objection overruled.*

W.P.A. 247. Re proposed terminal charge. *Objection sustained.*

W.P.A. 250-265. *Objection overruled.*

W.P.A. 266-271. Re proposed terminal charge. *Objection sustained.*

W.P.A. 272-273. *Objection overruled.*

W.P.A. 274-280, 286. Re matters after take-over. *Objection overruled.*

W.P.A. 287. Re Parmeelee charges after take-over. *Objection overruled.*

W.P.A. 288-289, 296. Re matters on change-over. *Objection overruled.*

W.P.A. 290-291. Re charge for clergy. *Objection overruled.*

W.P.A. 294-295. Re proposed lawsuit respecting Chicago city ordinance. *Objection overruled.*

W.P.A. 297. Re matters after take-over. *Objection overruled.*

W.P.A. 298-300. *Objection overruled.*

W.P.A. 312-320. Re matters on change-over and re formalizing contract. *Objection overruled.*

W.P.A. 321-324. Re dealings with Parmelee in July, 1955. *Objection overruled.*

W.P.A. 325-326, 327-329H, 349A, 398-419. *Objection overruled.*

W.P.A. 360. Re proposed terminal charge. *Objection sustained.*

W.P.A. 420-425. Re matters after take-over. *Objection overruled.*

W.P.A. 426-437. Re matters on take-over and re formalizing contract. *Objection overruled.*

W.P.A. 439-441, 443, 447-451, 454-466. Re matters after take-over. *Objection overruled.*

W.P.A. 442, 444-446, 453, 467, 469. Re matters after take-over. *Objection overruled.*

W.P.A. 470-502, 511. Re formalizing contract. *Objection overruled.*

W.P.A. 503, 508-510, 514-518. Re matters involved in change-over. *Objection overruled.*

W.P.A. 519. Re 1954 arrangement for transferring passengers to and from Englewood Station. *Objection overruled.*

744 W.P.A. 520. Re 1954 arrangement for transfer of baggage where margin of time less than 3 hours. *Objection overruled.*

W.P.A. 521-526, 559. Re routine of formalizing contract. *Objection overruled.*

W.P.A. 531-546. Re negotiations with Railway Express in 1948-49. *Objection overruled.*

W.P.A. 553-554. Markin letter, telling of extra Parmelee services rendered without charge. *Objection overruled.*

W.P.A. 557-558. Parmelee letter re alleged investment of $2,320,000 and 1947-48 operating results. *Objection overruled.*

W.P.A. 561-562. Re matters after take-over. *Objection overruled.*

W.P.A. 564-566. Letter from Senate Committee returning documents. *Objection sustained.*

W.P.A. 567, 569, 573-575, 577-588, 598, 601, 689, 711-712. Re proposed terminal charge. *Objection sustained.*

W.P.A. 568. Re reducing Parmelee operating cost by limiting service. *Objection overruled.*

W.P.A. 570. Report on payments to Parmelee and of coupons not picked up. *Objection overruled.*

W.P.A. 571-572. Routine on Parmelee service in 1944. *Objection overruled.*

W.P.A. 592-593. Re routine after take-over. *Objection overruled.*

W.P.A. 594-595. Re passenger complaint in 1947. *Objection overruled.*

W.P.A. 596-597, 662, 673-678, 689, 714-715. Re Parmelee service routine. *Objection overruled.*

W.P.A. 599, 692. Re take-over routine. *Objection overruled.*

W.P.A. 717-718. Litsinger affidavit re Keeshin purchases. *Objection overruled.*

W.P.A. 719. Litsinger letter re loan of station wagons for testing. *Objection overruled.*

W.P.A. 720. Trimmel statement re return to Litsinger of two loaned station wagons, prepared for and sent to Senate Committee. *Objection sustained.*

W.P.A. 721-723. Re routine after take-over. *Objection overruled.*

64—LaSalle Street Station Exhibits 1-10. Re matters after take-over. *Objection overruled.*

LaS. 11, 12. Memoranda. *Objection overruled.*

65—Chicago Union Station Exhibits 1-10. Memoranda. *Objection overruled.*

C.U.S. 11, 12. Re matter after take-over. *Objection overruled.*

745

66—Wall Street Journal clipping. *Objection sustained.*

67—Proceedings of meetings of Chicago terminal lines re Railway Express proposal to take over transfer of baggage, and re possibility that a railroad may wish to make an individual contract arrangement with Parmelee. *Objection overruled.*

Proceedings of other meetings. *Objection overruled*, except that *objection* is *sustained* concerning proposed charge to be included in through ticket charge.

68—Copy of agreement between Parmelee and the Nickel Plate. *Objection overruled.*

69—Letter Bone to Markin re radio announcement congratulating Parmelee on its 100th anniversary. *Objection sustained.*

70—Letter Siddall to Johnston re Parmelee. *Objection overruled.*

71—Letter Padrick to Markin. *Objection overruled.*

72—Memorandum Holt to Comer. *Objection overruled.*

73, 74, 75, 76, 77, 78, 79. Letters of congratulations from employees of defendant railroads to Parmelee on 100th anniversary. *Objection sustained.*

80—Letter Coleman to Scheeder complimenting Parmelee on transfer of service men. *Objection overruled.*

81—Letter Baird to Markin commenting on Parmelee's proposal. *Objection overruled.*

82—Letter Bruce to Markin thanking Markin for luncheon. *Objection sustained.*

83—Code of Ethics for Practitioners before the Interstate Commerce Commission. *Objection sustained.*

84—69th Annual Report of Illinois Commerce Commission. *Objection sustained.*

85—Organization minutes of Illinois Commerce Commission. *Objection sustained.*

86-94—Decisions of Illinois Commerce Commission and transcript of part of oral argument before Commission in one case. *Objection sustained.*

In brief, the above rulings generally hold that:

(1) The documents referred to by paragraph 1 of defendants' Motion In The Alternative are inadmissible.

(2) The documents referred to by paragraph 2 of defendants' said Motion are inadmissible.

(3) The documents referred to by paragraph 3 of defendants' said Motion are inadmissible.

(4) The documents referred to by paragraph 4 of defendants' said Motion are inadmissible.

(5) The documents referred to by paragraph 5 of defendants' said Motion are inadmissible.

(6) The documents referred to by paragraph 6 of defendants' said Motion are not inadmissible and may be tendered for ruling on admissibility at the trial in accordance with the limitations hereinbefore set forth by the Court.

(7) The documents referred to by paragraph 7 of defendants' said Motion are not inadmissible and may be tendered for ruling on admissibility at the trial in accordance with the limitations hereinbefore set forth by the Court.

(8) The documents referred to by paragraph 8 of defendants' said Motion may not be inadmissible and may be tendered for ruling on admissibility at the trial in accordance with the limitations hereinbefore set forth by the Court.

(9) The documents referred to by paragraph 9 of defendants' said Motion are inadmissible.

(10) The documents referred to by paragraph 10 of defendants' said Motion are inadmissible.

(11) The documents referred to by paragraph 11 of defendants' said Motion are inadmissible.

Dated: Dec. 4, 1959

747

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

748 MEMORANDUM AND ORDER.

(Filed March 10, 1960)

On January 6, 1960, this court heard oral argument upon objections to the rulings on admissibility of documents contained in its *Memorandum* dated December 4, 1959. In view of the nature and severity of the arguments advanced, the court deems it necessary to review the entire proceedings and refer to the transcript. The instant *Memorandum and Order* constitute the court's rulings on all points raised by the parties on January 6.

Summary of Proceedings and Documents Filed.

By Order entered August 1, 1958, this court ordered the parties to (1) file lists of the documents they respectively intended to offer into evidence at trial of the cause, (2) file "their objections to the admission in evidence of documents appearing on lists submitted by opposing parties," and (3) be prepared to present and argue at a pre-trial conference set for November 17, 1958, "all questions of evidence and scope of proof which they believe will or may arise during the trial of the case."

Plaintiff's *List of Documents*, filed September 25, 1958, explicitly purports to be a "list of documents which plaintiff presently intends to offer in evidence at the trial of this cause." On November 4, 1958, the defendant railroads 749 and railroad presidents filed their *Objections to Documents Included in Plaintiff's List*. In their opening paragraph, these defendants "object to the admissibility of the following documents on the grounds stated." There follows defendants' descriptions of thousands of documents referred to in or by the numbered paragraphs of plaintiff's "List of Documents," and the grounds upon which their objections lie. These Objections were adopted as their own by defendant Cross on November 3, 1958, and by defendants Keeshin and Railroad Transfer Service, Inc., on November 5, 1958.

On January 30, 1959, the defendant railroads and railroad presidents filed their *Motion to Strike Plaintiff's List of Documents and in the Alternative for Pre-Trial Rulings*. The alternate portion of the Motion requested (1) broad rulings that *all evidence*, documentary and otherwise, be excluded as inadmissible concerning ten matters of fact from which defendants anticipate the jury would be urged by plaintiff to infer the conclusion that the alleged conspiracy existed, and (2) a ruling that *documents* concerning telephone calls are inadmissible unless there is other evidence indentifying those calls with the subject matter

of the case. Defendants Keeshin and Railroad Transfer Service, Inc., adopted the said Motion as their own on February 11, 1959, so, too, did defendant Cross on March 4, 1959.

The *brief* filed by defendant railroads and railroad presidents on January 30, 1959, in support of their motion, 750 refers (at page 5) not only to their "alternative motion * * * for certain pre-trial rulings on matters of evidence," but also to "plaintiff's existing list [of documents] and the objections thereto." Plaintiff filed its *Memorandum in Opposition* on April 7, 1959, stating (at pages 3-4) that before trial the court "could reasonably dispose of" "such questions as authenticity or competency of documents."

Defendant railroads and railroad presidents in their *Pre-Trial Reply* memorandum filed April 27, 1959, identify their January 30 Motion as one to strike plaintiff's list of documents or "in the alternative for pre-trial rulings with respect to the admissibility of certain groups of the listed documents and for other relief" (at page 3), and as one "for rulings on admissibility of specified documents" (at page 4). On April 28, 1959, this brief was adopted as their own by defendants Keeshin and Railroad Transfer Service, Inc., and defendant Cross filed his reply brief, also joining in that of the other defendants.

A pre-trial conference was held by Judge Robson (to whom the case was reassigned in December, 1959) with the parties on May 11, 1959. Additional briefs were authorized by order.

Plaintiff filed its *Supplemental Memorandum in Objection to Defendants' Motions for Pre-Trial Rulings* on July 17, 1959. In it, plaintiff states that "relevant and 751 competent" evidence must be admitted into evidence (at page 4), that "this Court has a right to put reasonable limits on evidence which is merely cumulative" (at

page 7), and that "It would be improper for the court at this stage to attempt to rule upon the relevance and materiality of these areas of proof" (at page 36).

On August 11, 1959, defendants filed their *Reply to Plaintiff's Supplemental Memorandum*. At page 18 thereof, it is stated that "the issues [before the court] are presented by the detailed 'objections of Defendant Railroads and Railroad Presidents to Documents Included In Plaintiff's List' filed November 3, 1958, and by our 'Motion for Pre-Trial Rulings' filed January 29, 1959."

By order entered November 12, 1959, on motion of the defendant railroads and railroad presidents, this court directed that the transcript of the May 11, 1959, pre-trial hearing before Judge Robson be filed. The transcript was filed on February 26, 1960.

Plaintiff's Contention Concerning the Court's December 4 Memorandum.

(1) At the January 6, 1960, hearing, plaintiff argued that the court "has been misled, misinformed, and imposed upon" (Transcript, at 6; see also Tr. 52, 64-65); that the court "didn't intend it, and you have been misled" (Tr. 40); that the court has excluded documents "under a misapprehension and a description that is not accurate" 752 (Tr. 51); that the court has "a sardonic sense of humor" (Tr. 52); and that the court's rulings were "the result of a misapprehension of what was involved here" (*Ibid.*).

The court is unable to find any basis for these charges. The purpose of rules which authorize responsive briefs is to afford parties sufficient opportunity, not only to present to the court their respective positions, arguments and opinions, but also to demonstrate any fallacies in those of their opponents.

(2) Plaintiff's counsel argues that the court was not presented with the issue of "the admissibility of individual

documents" (Tr. 46, 47, 57); that the plaintiff believed that the Order of August 1, 1958, was "an accomodating order, to both parties, to make available the outside limits of the documents that would be produced at the trial with no surprise" (Tr. 46); that "the only issue presented to your Honor was an issue in a motion [of January 30, 1959] by the railroad defendants. • • • In this motion and in the supporting memoranda there was no discussion of the individual documents" (Tr. 47); that "the plaintiff never even argued these objections that were made to documents" (Tr. 48-49); that "The real purpose [of the August 1, 1958, Order] was if there was an objection to the genuineness of a document, this could be resolved in pre-trial" (Tr. 49); that "We didn't make a mass offering of these documents as your order would indicate" (*Ibid.*; see also Tr. 50, 59); that "We submitted a list of documents under various headings for the convenience of counsel to tell them what information we had" (Tr. 58); that plaintiff did not "make a blanket offer of documents" (Tr. 71); and that "All I want is the right to offer evidence" (*Ibid.*; see also Tr. 72).

753

An examination of the documents on file in this cause demonstrates that the court was, in fact, presented with the issue of the admissibility of individual documents. The basic purpose of the order of August 1, 1958, insofar as it concerned documents, was to provide a means by which the admissibility of documents would be assessed prior to trial. Plaintiff has represented to the court that it intends to offer each and every document identified in its "List of Documents." That plaintiff has not yet actually offered these documents for admission into evidence is irrelevant. The court in its December 4, 1959, Memorandum has assessed the admissibility of the documents heretofore intended to be offered into evidence by plaintiff.

(3) Plaintiff's counsel argues that the court did not see or examine "a single one of these documents. • • • [T]he

documents are not even adequately described" (Tr. 48); that the documents "have been identified by the plaintiff only by number to facilitate preparation for trial" (Tr. 5); and that the court's rulings "could not be a matter of judicial determination but clairvoyance. • • • I could
754 not determine and identify these documents with any care in less than six months or three months, after I have worked with them for many years, as there are so many and they are so diverse" (Tr. 50).

It is not necessary that the court personally examine each document the admissibility of which is being tested. The court has the right and the power to rely on the parties' descriptions of those documents, so long as their descriptions are in accord and do not conflict. Especially must this principle apply in a case where the documents proposed to be offered are admittedly so numerous and so diverse. If plaintiff had desired to take issue with any of the defendants' descriptions it had ample opportunity to do so. This court would certainly have granted plaintiff whatever reasonable time extension might have been requested in order for a proper response to any of defendants' descriptions.

(4) Plaintiff's counsel argues that the court did not limit its examination concerning admissibility of documents to the specific grounds stated by defendants in support of their objections, and its rulings "go beyond the defendants' objections" (Tr. 53 62; see also Tr. 33, 44); that the court failed to conclude that "There are no reasons • • • why [documents ruled inadmissible] can be excluded" (Tr. 33); and that the court went "completely beyond the defendants' position" (Tr. 55).

755 When the court is presented with an objection to the admissibility of documents, the court has the power to exclude them on any ground that renders them inadmissible. The court is not limited to a consideration only of the

specific grounds asserted by an objecting party in support of its objection to admissibility. The court's ruling cannot be impeached by a contention that the court applied a rule of law other than one on which the objector predicates his objection.

(5) Plaintiff's counsel argues that the court has no power to make pre-trial rulings that documents are inadmissible (Tr. 61); that the defendants' objections were predicated "largely on materiality and relevancy" (Tr. 48); that "We should not be subjected to rulings in advance of trial on materiality and relevancy" (Tr. 61; see also Tr. 49); and that "there should not be any final determination of relevancy and materiality" (Tr. 59).

Plaintiff apparently misconceives the functions and purposes of pre-trial conferences, hearings and rulings. Particularly in protracted, prolonged and involved litigation, it is necessary that a determination be made as to the issues to be tried and the propriety of the evidence proposed to be introduced on those issues. Such determination, as all rulings of the court must be, are final and binding upon the parties while they are in that court.

(6) Plaintiff's counsel argues that the court failed to admit documents under the "broad avenue of proof 756 known as admissions against interest" (Tr. 31); and that counsel for defendants conceded at the May 11, 1959, pre-trial conference that "we can use them as admissions against interest" (Tr. 56; see also Tr. 63).

Documents designated as admissions against interest are nevertheless subject to the general rules of evidence. To be admissible, they may not be based on rumor, opinion or speculation, be irrelevant, have an immaterial bearing on the issues in the case, be secondary to accessible primary evidence, and so on. The rule pursuant to which a document may be characterized as an admission against interest is an exception to and cures only one evidentiary defect—

that of hearsay. If it is subject, too, to attack on another ground, it remains inadmissible.

(7) Plaintiff's counsel contends that the court has limited "our liability to discover evidence [and] our ability to establish proof" (Tr. 39); that the court has excluded all "the proof which has to do with those allegations" of the complaint to which such proof relates (Tr. 69); and that plaintiff has been "precluded from whole areas" (Tr. 70).

When documents appear to be clearly inadmissible, the consequences of their exclusion upon the final disposition of the merits are factors of which the court cannot concern itself. Plaintiff is not prohibited from offering any admissible proof on the issues properly to be tried.

757 (8) Plaintiff's counsel argues that "the Court enjoins us, the plaintiff, not to tender these documents [that the court regards as inadmissible] at the trial, and then says that for impeachment purposes only they may be utilized with the court's approval if a specific fact is to be contradicted by this document patently and explicitly and not by inference or implication" (Tr. 5; see also Tr. 42, 44, 48, 56); and that "we can't even tender and offer the evidence which is in the complaint" (Tr. 70).

As to this objection, the court does not intend to engage in further discussion relevant to the consequences of its well-considered rulings.

(9) Plaintiff's counsel argues that the court by excluding documents "destroys our opportunity for a jury trial [and is] usurping the authority that should be with the jury to determine what inferences lie in this proof" (Tr. 44).

This contention is obviously frivolous. The court's rulings on admissibility of documents or evidence apply without regard to whether the case will be tried to a jury or to the court.

(10) Plaintiff's counsel argues that the court failed to consider and follow the pre-trial statements of Judge Robson, who "had committed himself as to how he was handling the matter" (Tr. 66; see also Tr. 66, 68, 62).

I am unable to find any basis for plaintiff's conten-
758 tion that Judge Robson "committed himself" or any orders to that effect. Nor is there any inconsistency between his remarks and the rulings now made.

(11) Plaintiff has also excepted to the court's rulings concerning certain specific items. For the most part, its contentions concerning these items are desribed in one or more of the ten "complaints" set forth above with quotations in this memorandum. These items are identified by the plaintiff in oral argument as:

(a) Code of ethics (Tr. 24)
(b) Statement by Mr. Morehouse (Tr. 24)
(c) Gurley affidavit (Tr. 30)
(d) Documents concerning Cross purchase of Deerfield house (Tr. 33-34, 62-63)
(e) Records of telephone calls from Forgash to Cross, from Forgash to Keeshin, from Keeshin to Carrolton, Illinois, from Keeshin to Cross (Tr. 39, 42)
(f) Details of Baltimore and Ohio financing matter (Tr. 43)
(g) Keeshin memoranda K-54, 57, 58, 60 and 61 (Tr. 50-51)
(h) Telephone records of Cross concerning calls to Keeshin and to railroad presidents (Tr. 51)
(i) Item No. 22, Exhibits 3 and 6 (Tr. 52)
(j) Forgash Exhibit 1 (Tr. 52).
(k) Ryan Exhibit 1 (Tr. 52)
(l) Item No. 4, Simpson's appointment book and Simpson's secretary's appointment book (Tr. 53)
(m) Johnston telegram (Tr. 54-55)

(n) Union League Club registration slips (Tr. 55)
(o) Senate transcript (Tr. 55-56)
(p) Documents concerning house sold by Cross (Tr. 62-63)

The court notes plaintiff's contention, made for the first time at the January 6, 1960, hearing that items identified under (g) were not included in "Plaintiff's List of Documents". Although plaintiff's suggestion is tardy
759 by approximately one year, the court has examined plaintiff's "List" and concludes that defendants' objections to admissibility of the said documents should have been stricken rather than overruled.

The court also notes plaintiff's new contention that the items identified under (h) were misdescribed by defendants in their "Objections to Documents Included in Plaintiff's List". Counsel for defendants has by letter (with the notation thereon that a copy was being sent to plaintiff's attorney) advised the court that plaintiff's said contention is correct, and that the said items were, in fact, so misdescribed. The court rules that defendants' objections to admissibility of the documents heretofore described in the court's memorandum as "Telephone company records of Baltimore & Ohio toll charges" are stricken. There is, however, a general objection by defendants to the admissibility of documents concerning telephone calls. That objection is sustained as to the said items as now properly described.

Defendants' Contentions Concerning the Court's December 4, Memorandum

Defendants' argument concerning the Court's December 4 memorandum discloses the following to be their contention:

760 "We have asked to have those five areas of evidence excluded, and your Honor has excluded all of

them by ruling that the documents are not admissible. That is a limited ruling your Honor made, because he was thinking of the objections to the documents and didn't have in mind the comprehensive motion that we made for these area rulings on evidence." (Tr. 87; see also Tr. 89-90, 92, 96).

This court has not excluded any "areas" of proposed evidence by its rulings on the admissibility of documents, except as such "areas" may be legally affected by these rulings.

761 ORDER

The court has re-examined with great care the motions, briefs, memoranda and other documents filed by all parties and the orders and rulings heretofore entered by the court.

The court has examined each and every contention of all parties with respect to the memorandum dated December 4, 1959, and has afforded counsel for all parties full opportunity to present and argue their respective contentions.

It Is Hereby Ordered that the rulings made in the *Memorandum* dated December 4, 1959, insofar as they are not specifically changed by the court's statements hereinabove, shall stand and shall govern the tender of the subject documents at the trial of this cause. The said *Memorandum*, together with this, shall be filed and entered instanter as the Order of this court.

The cause has been set for trial on April 4, 1960, pursuant to oral stipulation of the parties in open court and the approval of the court.

J. H. Miner
United States District Judge

Dated: March 10, 1960

1 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *
(Filed Jul 13 1960)

2 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Julius H. Miner, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois, on Thursday, April 14, 1960, at 10:00 o'clock, A.M.

Appearances:

Messrs. McConnell, Paschen, Curtis & Loohy,
(Suite 1110, 134 South LaSalle Street,
Chicago, 3, Illinois,), by
Thomas C. McConnell, Esq.,
Herbert C. Paschen, Esq.,
Francis J. McConnell, Esq.,
Lee A. Freeman, Esq., (Suite 514, 105 South
LaSalle Street, Chicago 3, Ill.),
and
John Paul Stevens, Esq., (Suite 820, 105 S.
La Salle Street, Chicago 3, Ill.),
on behalf of the Plaintiff;
Albert J. Meserow, Esq., (Suite 1353,
231 S. LaSalle Street, Chicago 4, Ill.)
Jerome F. Dixon, Esq.,
Theodore J. Isaacs, Esq., (Suite 1613,
231 S. LaSalle Street, Chicago 4, Ill.)
on behalf of the Defendants John L. Keeshin
and Railroad Transfer Service, Inc.;
Joseph C. Owens, Esq., (Suite 1111, 100 N.
LaSalle Street, Chicago 2, Ill.)
on behalf of Defendant Hugh W. Cross;

Marvin A. Jersild, Esq.,
(Suite 1236 LaSalle Street Station,
Chicago 4, Ill.),
On behalf of Defendant The New York
Central Railroad Company;
Floyd E. Thompson, Esq.,
Philip W. Tone, Esq.,
(Suite 3300, 135 So. LaSalle Street,
Chicago 3, Ill.);
On behalf of defendant railroads.

By Mr. F. J. McConnell: Good morning, your Honor. This is our motion to continue the trial now set for next Monday, April 18th, for one week, to April 25th.

Your Honor will recall that when we were in here last January, and we discussed tentatively setting this case for trial in April, my father called to your attention the fact that the McDonald case was set for trial February 1, and that that case would probably take six weeks to try.

As your Honor stated at that time that, of course, you would not interfere with him in his handling of that matter.

By the Court: Any objection?

By Mr. Meserow: There is.

By Mr. F. J. McConnell: There is, and that is the reason why I am stating the reasons.

And the case was tried, and it did take six weeks to try.

Now, when we were in here last—I think it was March 23rd—and we asked that this case be set over until the fall term, at that time it appeared that all proceedings, all trial proceedings in the McDonald matter would be concluded by the April 18th date set by your Honor.

There was one matter left, and that was the hearing

on the entry of findings of fact, conclusions of law, and the final decree. And that was set for April 1st, before his Honor, Judge Adesko.

Now, it happened, due to the death of the late Judge Griglik that the Court was closed on that day, and that hearing had to be postponed.

By the Court: Let me hear the objections.

By Mr. Tone: I am here, your Honor, because Judge Thompson had to attend a funeral out of the City today.

All we have heard, as a reason why this case should be continued for a week, is that Mr. McConnell has an engagement in the McDonald case at four o'clock Monday afternoon.

I don't know why that means that the case should go over a week, rather than a day. We say, at any rate, even if he wants to keep that engagement, it would be certainly feasible to pick up a jury Monday, and to go right ahead and let him go at 3:30.

Secondly, we don't think that any other engagement should interfere with this one. There are five sets of lawyers in this case, and if we waited until every lawyer and every set of lawyers could conveniently appear before this Court, we never would get to trial.

We are getting a late start already in the spring. We have asked Mr. Foit to be here. Mr. Foit is an undersecretary or an under—excuse me—a deputy assistant secretary of the Army. It is very difficult for him to be absent from Washington for more than a day or two at a time.

We want him here, and we feel he should be here when the jury is picked. The plaintiffs have asked us to have him here as one of the first witnesses to testify. We have made arrangements to have him here, and he is coming in this week-end.

We do not want to change those plans. We think it would be most inconvenient for him to change them, since he has responsibilities in the Defense Department which are not to be lightly regarded, so we would urge the Court to deny the motion.

There are—we have matters, too, that we will have to postpone for this trial next week. In the alternative, if we could pick a jury Monday, I think we could finish in time so that Mr. McConnell could get over at four o'clock before Judge Adesko.

By Mr. Meserow: Your Honor, we, too, object to the continuance, and it is not a question of witnesses with us, but is a question of the lawyers.

Now, I have made certain commitments, and I have other cases and other trials and other hearings, and I have made arrangements to go ahead on Monday, April 18th, and I think you should deny this motion to continue.

By Mr. Owens: Your Honor, I have only been in this case a couple of weeks, and I have devoted all of my time in preparation for the trial of it. I have rearranged my schedule next week, so that I will have nothing.

By the Court: What about Wednesday or Thursday, can we go on then?

By Mr. Freeman: Your Honor, let me just add to what Mr. McConnell has said.

We intend, of course, to go ahead when your Honor sets this for trial, and—

By the Court: I have set aside all of my whole week.

By Mr. Freeman: I think if your Honor sets it for Thursday, this will be adequate, and we will—I will undertake to notify all counsel of the—of my estimate of the order of witnesses. I will send a letter out today to Mr. Tone and the rest of them, so that I can advise them when we intend to call these witnesses.

I will do the same with respect to Mr. Cross and Mr. Keeshin, as best I can estimate it, and I will try to keep them advised approximately four, five, six days in advance, as the trial progresses, and while I would like very much for the trial to go over until next week, that is, the following week, because I have a Board of Directors' meeting, but I would not stand in the way of Thursday, if that seems convenient for you.

By the Court: Let me see, I think I have got some recent law here. Excuse me for a minute.

These citations have come to my desk very recently, as you will tell, because they are not published yet. There are a lot of changes in the law since we first started.

Primarily, I am going to read you the case of Marks Food Corporation v. Barbara Ann Baking Company, 274 Fed. 2d, 943. I am reading from Page 936:

> "In the consideration of these points, we must first note that the trial court in proper circumstances, has the right to order separate trials for separate issues in the same case."

This is a jury case also. I am thinking seriously
9 of invoking Rule 21 of the separation of issues in the trial primarily of—I am merely giving you some thought between now and Thursday.

And then we have also another case here, the Seventh Circuit, Radiant Burners, Incorporated v. Peoples Gas, Light & Coke Company, 273 Fed. 2d, 196, and these are not the only cases. I have check the laws and the facts of the case. This case was written by Judge Castle in which he holds:

> "In the instant case, no buyer-seller relationship between plaintiff and any of the defendant appellees is involved. The allegations do not establish a concerted refusal by the appellees to enter into any business relation with the plaintiff."

Here they go on and they hold that public injury and liability is a vital and essential factor in the disposition of anti-trust cases.

Now, since we have adopted the Rule 21, and since we have—I feel we have power under the law, I am thinking seriously of trying first the element of public liability—public injury or public prejudice, and then go on with the same injury if we were to establish it under the remainder of the facts, so give it some thought between now and then.

I have given you some citations. That is what I am thinking about, and it is my own rule, and I will give it a little more thought, and I will discuss it with you Thursday morning.

By Mr. Tone: Your Honor, would it be possible to set a pre-trial in the case before Thursday—say, Friday? We have a lot of preliminary matters to set before your Honor: How many challenges the defendants are going to have, and various things.

By the Court: I intend to spend some time with you when we are in on the trial. I don't want to set them preliminary to going ahead with the trial, because it is not going to accomplish anything.

There will be more time spent on briefs and more time on rules, and more time on haranguing and arguing.

I want to be fair on the challenges, very fair. I want to be fair on the number of jurors, and I want a discussion with you, and while the law is clear, the rules are clear; we have got only one plaintiff and numerous defendants, and I propose to give the defendants a little more leeway and also the plaintiff, and I am not going to be harsh about it, or unkind.

I am seriously thinking to invoke the separation of trial, and if you will read those two cases, you will find that I am pretty much on the beam on both of them.

It may save a lot of time before we go on with the others. But I do not intend to invoke the same jury.

First, the question of public injury, and then the second one, if the first one is sustained.

I feel this is a prerequisite for the plaintiff's right to recover on the question of establishing public injury.

By Mr. Tone: Your Honor indicates that he intends, then, to have a pre-trial conference at the beginning.

By the Court: I intend to spend a lot of time with you when you are ready for trial Thursday; we will go in and probably spend all morning discussing it, and then we will go out and try the case.

By Mr. Tone: What I am concerned about particularly is when to get Mr. Foit here.

By the Court: I will tell you what I am trying to avoid. I don't want to get into any more discussion on areas. I have read Judge Robson's transcript. He made no ruling on it, and made no recommendations on it.

12 I felt that I have ruled enough when I ruled on the questions of the documents and the exhibits. I think they pretty much reflect on my attitude on areas, and I cannot say at this time, and don't propose to say at this time, which areas are and which areas are proper and improper. I will meet those situations as we go on, and we will discuss them with the lawyers as we go right ahead with them.

By Mr. Freeman: Well, your Honor,—

By the Court: I could not arbitrarily say this area is out and this area is in.

By Mr. Tone: I don't think we are going to ask your Honor to reconsider anything he has considered.

We do have in mind, I think, the matter of the scope of the opening statement in the light of the rulings your Honor has made.

By the Court: I will discuss that with counsel. First, let's determine the injuries; let me decide first on the scope.

If I go in on the public injury alone, we are going to limit that to that alone, and then we will go on with the balance of it.

13 By Mr. Tone: I think what your Honor certainly decides to do about that will certainly affect the other matters that we would want to present.

By the Court: I just got them two days ago. I have other cases on my desk. I have read all of the briefs in this case. I have read all of the pleadings.

I will say this: In the pleadings, there is a specific allegation by the plaintiff of public injury. There is a special denial by the defendants of public injury. That joins the issue. In my judgment, that makes a prerequisite to the establishment for its establishment before we can go on with the others, the right to recover.

If we can prove that one, we have one with the rest of them before the same jury.

By Mr. Freeman: I don't know if you mean by public injury the same thing I believe you do.

Since those pleadings, the United States Supreme Court has ruled—

By the Court: I am not going to get into the differences and the question of per se, and everything else.

By Mr. Freeman: You mean liability?

By the Court: Public injury.

14 By Mr. Stevens: There are cases holding, your Honor, that the proving of a violation of the antitrust laws does not establish the public injury and perhaps we should be prepared on that.

By the Court: I am not prepared to prove what?

By Mr. Stevens: Once you have established the antitrust laws, you have established the injury.

The Court: I don't want to make a ruling until I get to the case and until I hear the evidence.

I cannot say now, it is or it isn't a per se violation. I don't want to do that until I hear the facts. When I hear the facts, I will determine whether or not it is per se, or it isn't.

By Mr. Freeman: Thank you.

By the Court: Now, I can't be fair about it, and there are a lot of cases which you say, but they are different type of cases.

Congress had defined and intended to make anti-trust a violation in certain areas of price fixing, limiting competition, as primarily the object of the anti-trust law.

On the other hand, I will give you fifteen citations that hold that this kind of a deal is not within the per se violation.

15 By Mr. Freeman: We don't speak of the per se violation, your Honor.

By the Court: You don't?

By Mr. Freeman: And let us at the proper time present you with the authorities, so that you will understand our position.

By the Court: I felt as long as you are here now, I may as well prepare you for what I am going to talk to you about Thursday, because you have got a specific issue in your pleadings: Public injury and the denial.

My judgment is that under that pleading, it is a prerequisite that it be established before the plaintiffs try to recover. There is a lot of law on that. So let's see you Thursday morning.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

CERTIFICATE

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 15 is a full, true and accurate transcript of the original shorthand notes of all the proceedings had upon the hearing of the above-entitled cause, on April 14, 1960, before the Honorable Julius H. Miner, Judge of said Court.

/s/ Roy E. Fuller
Roy E. Fuller
Official Court Reporter
United States District Court
Northern District of Illinois

April 14, 1960.

1 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 323) * *

2 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Julius H. Miner, one of the Judges of said Court, and a jury, in his court room in the United States Court House at Chicago, Illinois, commencing on Thursday, April 21, 1960, at 10:00 o'clock a.m.

Appearances:

Messrs. McConnell, Paschen, Curtis & Looby,
(Suite 1110, 134 South LaSalle Street,
Chicago 3, Illinois,), by
Thomas C. McConnell, Esq.,
Herbert C. Paschen, Esq.,
Francis J. McConnell, Esq.,

Lee A. Freeman, Esq.,
(Suite 514, 105 South LaSalle Street,
Chicago 3, Illinois),
John Paul Stevens, Esq.,
(Suite 820, 105 South LaSalle Street,
Chicago 3, Ill.),
and
Herbert B. Lazarus, Esq.,
(1790 Broadway, New York, New York),
on behalf of the Plaintiff;
Albert J. Meserow, Esq.,
(Suite 1353, 231 South LaSalle Street,
Chicago 4, Ill.),
Jerome F. Dixon, Esq.,
Theodore J. Isaacs, Esq.,
(Suite 1613, 231 South LaSalle Street,
Chicago 4, Ill.),
on behalf of the Defendants John L. Keeshin
and Railroad Transfer Service, Inc.;
3 Joseph C. Owens, Esq.,
(Suite 1111, 100 North LaSalle Street,
Chicago 2, Ill.),
on behalf of Defendant Hugh W. Cross;
Marvin A. Jersild, Esq.,
(Suite 1236, LaSalle Street Station,
Chicago 4, Ill.),
on behalf of Defendant
The New York Central Railroad Company;
Floyd E. Thompson, Esq.,
Philip W. Tone, Esq.,
(Suite 3300, 135 South LaSalle Street,
Chicago 3, Ill.),
on behalf of defendant railroads.

4 And Thereupon the following proceedings were had herein:—

By the Clerk: No. 56 C 323, Parmelee Transportation Company, vs. John L. Keeshin, et al, for trial.

By the Court: Good morning. Are you rested?

By Mr. McConnell: No, I am not rested.

By the Court: All right; I am still of the same opinion. I am going to trial on the question of public injury, and if and when that is sustained, we are going on with the same jury on the remainder of the issues.

By Mr. McConnell: Your Honor, I understood, and I wasn't here, but I read the transcript, and I understood you wanted to hear from counsel on that question.

By the Court: I will hear from you. I said and I still say that I am of the same opinion, but it is open for discussion.

By Mr. McConnell: I would like to be heard on it.

By the Court: Certainly.

5 By Mr. Thompson: I agree with Mr. McConnell the matter ought to be heard, and there are numerous matters for consideration in pretrial before we can start selecting a jury.

By the Court: Yes. I want to hear from counsel for both sides, and I will hear you.

By Mr. McConnell: May I proceed?

By the Court: You are on trial. Go ahead. Has the last transcript been written up?

By Mr. Freeman: Yes, sir.

By the Court: Who has a copy of it? May I have a copy?

By Mr. Freeman: Yes.

(Document handed to the Court.)

By the Court: All right, Mr. McConnell, go ahead.

By Mr. McConnell: I have read the transcript, and as I say, I wasn't here when this matter was discussed—

By the Court: Yes, I know you weren't.

By Mr. McConnell: —and it is not clear to me still from the transcript what your Honor had in mind in reference to the issue of public injury as distinguished from other issues in this case.

I have had considerable experience with the anti-
6 trust laws and have tried quite a few cases, as your Honor probably knows, in that field, and I have never heard of that particular issue being singled out in contradistinction to other issues in an anti-trust case.

7 The issue has been referred to as an element of proof usually in cases which arise on pleadings, as to whether or not an allegation of public injury as distinguished from private injury must be made in the civil litigation for treble damages. But this presents an utterly new position with reference to the issue of public injury.

In the cases where that issue has been discussed, they have been resolved either on pleadings or on motions for summary judgment. To two of those cases I wish to advert in the course of this argument.

We have alleged in this complaint, as your Honor knows, because your Honor says in the transcript that you have read our pleadings, we have alleged a conspiracy here between these railroads and Mr. Keeshin and his company and Mr. Cross, to preclude or to boycott or to prevent Parmelee Company from bidding for or obtaining or being considered as against Mr. Keeshin's company for this transfer business.

Those allegations were before Judge Sullivan on their legal sufficiency. Now, I wasn't in the case at that time, and I don't say this in any manner of criticism of my co-counsel or in an attempt to say that anything was done that should have been done differently, but the issue
8 was argued—have you got Judge Sullivan's opinion there?

Even after that argument it is not clear what was being considered on the issue of public injury. But on the pleadings—and I take it that we are going to try this case on pleadings. That is the way cases are usually tried.

Judge Sullivan, in referring to that contention which was made on the motion to dismiss the complaint, stated, and I am quoting from Page 7 of the transcript of his opinion:

> "It is urged that the complaint is fatally defective in that it fails to allege an injury to the public as opposed to a merely private wrong, and of course, such an allegation is required—"

And he cited the Pederson Motors case, 180 F. 2d 519.

9 Then he goes on and says:

"In the instant case, however, the requirement has been met. The allegation of the elimination of competition for the contract to provide terminal transfer services is itself sufficient—" and he cites United States against Yellow Cab Company, in which the Supreme Court stated, and I am paraphrasing what they said, that there was an important segment of interstate commerce involved in this transfer business from one terminal depot to another here in Chicago, and that it was all part of the stream of interstate commerce, and what was presented by anything that attempted to preclude a competitor from competing for any portion of that business was a direct, as distinguished from an indirect, effect upon interstate commerce and was a violation of the Sherman Act.

Now stopping there, if what we are talking about here is an issue which involves whether or not these defendants have violated the Sherman Act, and that is what your Honor intends to prove before we get into the issue of damages, if that is what we are talking about, I think it

would make it more difficult to handle this case that
10 way. I don't have too much objection to that sort of procedure, if that is what your Honor wants to do for any reason which your Honor may have in mind. Of course, even on that issue, I want to call to your Honor's attention that in a civil action as distinguished from an action brought by a public prosecutor, the private litigant has the further burden of showing that he is damaged. Otherwise there isn't any liability under the anti-trust laws. There is just no overhanging liability under the anti-trust laws unless somebody gets hurt and can come in and show that they are hurt.

So even on the issue of liability, we would at least have to show, in order to make out a case, that we were hurt. We might not have to show it in exact figures, in dollars and cents how much we were hurt, but the cases have referred to the fact of damages as distinguished from the amount of damages, and I think in order to make out any case under the anti-trust laws for a private litigant which this Court would want to take cognizance of, we would have to show that we were in the business and that we were hurt by being excluded from the business. Our proof would certainly have to go that far

11 Now if what your Honor has in mind is the conspiracy issues or monopoly issues, if you want to refer to them that way, though we are alleging violation of both sections of the Sherman Act, both a conspiracy to monopolize and exclude a competitor and also the fact of monopolizing a segment of commerce, plus the fact that we are injured — if that is the issue we are about to try, that is one thing. But if it is a more limited issue, if what your Honor has in mind is some specific injury to the public as distinguished from an injury to a litigant due to rates or service or something of that kind, or quality of the service rendered and things of that kind, then I have a very serious quarrel with the proposed

method of proceeding. It is to that that I wish to address myself because I must assume that that is what is in your Honor's mind.

By the Court: That is what is in my mind.

By Mr. McConnell: Now this matter of adding conditions, hurdles and blocks for litigants to get over in anti-trust cases is not novel and is not new and is not something that I haven't met many, many times in one form or another.

I can recall two cases that I have tried where the
12 Thompson law firm raised the question. They raised it in the Zenith case, saying we had to show some special public injury as distinguished from a violation of the anti-trust laws, and that was overruled there by Judge Igoe.

It was also raised in the Congress case, and while it wasn't specifically dealt with, the opinion of Judge Knoch which dismissed the Congress Theatre case was reversed by the Court of Appeals and the case sent back to be tried.

The only injury that was alleged in either of those cases or proved or attempted to be proved was a violation of the act. It is our contention here, and it has always been my contention in these cases, that the act of the Congress defines the public injury, and when the Congress says that certain things are forbidden and unlawful and illegal, and you show that those things have been done, then you have brought yourself within the provisions of the Act, and to add something else by interpolating by court procedures or by court rulings, which is not within the scope and the purport of that act — Congress itself determined what it wanted to stop and what it didn't want to stop, having set forth in an act what is a violation of the act, and then if we prove a violation of that act,
13 we have done all that the Congress ever intended a private litigant to do. To buttress my statement on that, I want to go to the Radovich case.

14 The Radovich case seems to me is the entire, the beginning and the end.

By the Court: Which case?

By Mr. McConnell: The case of Radovich against National Football League, 352 U.S. 445. It is One Law Edition, 2d, 456.

The title of the case is Radovich against National Football League. Radovich brought an action for treble damages and injunctive relief under Section 4 of the Clayton Act, and he alleged that the National Football League conspired to prevent him from getting employment, and he alleged that the business was in interstate commerce, and that when he attempted to obtain employment by the San Francisco Clippers, a member of the Pacific Coast League, the National League wrote that league and said that he was black listed because he had violated a contract which he had had with a team in the National Football League.

A lower court held there was nothing in his complaint which set out specifically that there was any injury to the public by virtue of his being black listed, that after all he was an old football player practically ready to go on the shelf, as he was thirty-five years old, and it didn't make any difference to the public, that there 15 wasn't any threat of any of these leagues being closed up, and therefore that there couldn't be any interest in the public whether somebody hired Mr. Radovich or didn't hire him, and therefore, even though he may have shown private injury, he hadn't shown any public injury, and there was an issue squarely raised in both the lower court and the Court of Appeals—

By the Court: On the pleadings or on the trial?

By Mr. McConnell: Raised on the pleadings.

The case went up and was taken on certiorari by the Supreme Court. There were two questions raised, really.

One was whether football came within the purview of the anti-trust laws, and the defendants, of course, relied on the baseball case which had held way back when baseball didn't come within it, and that was sustained in the Toulson case by the Supreme Court, where the Court said, in effect, that the baseball case was sui generis and didn't apply to football, and that football did come within the purview of the anti-trust laws, and there was television involved and radio and interstate commerce was involved, and so forth.

The only question here is whether or not he had to show, as distinguished from injury to himself, that
16 the public was injured, and the Court dealt squarely with that question.

The Court says this, on page 462, of One Law Edition 2nd:

> "We now turn to the sufficiency of the complaint. At the outset, the allegations of the nature and extent of interstate commerce seem to be sufficient. In addition to the standard allegations, a specific claim is made that radio and television transmission is a significant, integral part of the respondent's business, even to the extent of being the difference between a profit and a loss."

Then they say:

> "Likewise, we find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Justice Holmes in Hart *v.* B. F. Keith Vaudeville Exchange is whether 'the claim is wholly frivolous.'
>
> 17 While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, 'we are not prepared to say that nothing can be extracted from this bill that fails under the act of Congress.'"

Then they get into this point which we are discussing here:

"Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,'" citing Times Picayune Publishing Company *v.* United States.

". . . and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the anti-trust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public." Citing Mandeville Island Farms, Incorporated, *v.* American Crystal Sugar Company.

18 "Futhermore, Congress itself has placed the private anti-trust litigant in a most favorable position through the enactment of Section 5 of the Clayton Act." Citing the Emich Motors Corporation *v.* General Motors Corporation case.

"In the face of such a policy, this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws. Respondents' remaining contentions we believe to be lacking in merit. We think that Radovich is entitled to an opportunity to prove his charges."

What the Court says there in word which nobody can misunderstand is if you proved a conspiracy in interstate commerce violative of the Sherman Act, that you have satisfied any requirement of injury to the public, because the Congress itself is the protector of the public interest and has enacted a law to do that after full consideration of all the factors which are involved in the public interest, and that the Court should follow and should sustain the acts of Congress.

Mr. Freeman calls my attention that in that quote
19 which I have read to your Honor the reference to Note No. 10, which is as follows:

"In Apex Hosiery Company *v.* Leader, 310 U.S. 469, 84 Law Edition, 1311, this court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."

Then speaking of the anti-trust laws, the Court said:

"The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results."

20 As I say, that is just as clear a statement as could ever be formulated, that all a private litigant has to do in the enforcement of the anti-trust laws, and this should be considered, too, by your Honor, that the Congress has in mind, and the Supreme Court has said this again and again.

They said it in a case I had, the Bigelow case, when they took it on certiorari, when they granted certiorari, where they said that the public enforcement of the anti-trust laws is aided by the private litigant's efforts, spurred, of course, by obtaining treble damages for the injuries sustained by the private litigant.

21 The private litigant in the litigation which they bring before the courts performs a public function by enforcing this law which the Congress thought was in the public interest, or they wouldn't have enacted it.

The only reason for enacting laws of this kind is in the public interest. To say we have to show something different and beyond the Act, which is not included in the Act, would be like saying that we couldn't convict a man for murder, even though he murdered somebody, because the public wasn't damaged, and he might have been a fellow who was very good to get out of the community and get rid of, and everybody might agree on that.

You might just as well argue the man wasn't guilty of murder, because the fellow he murdered was no good, and the public was just wonderfully benefited by having him in his grave.

Before I go to my other case, I want to spell this out in a little more detail. It is perfectly obvious that our community is a free community, intended to be such, that these laws have a great public significance.

You cannot run a free economy based on cartels and monopolies and exclusions from a right to compete
22 in a free competitive order. There isn't anything in between.

You either have a free economy, or you have a cartel or dictatorship. There is nothing in between, and with a great deal of wisdom, it seems to me, and the courts have said this over and over again, that with a great deal of wisdom the Congress enacted these anti-trust laws to preserve for our heritage a free economy where people could compete for things, where they could carry on their business activities free from group boycott, free from group conspiracies, free from having all of your competitors ganged up against you or all of your customers ganged up against you where you cannot do business with them.

The public interest in that is so obvious, particularly in the days in which we are now living, that it would seem to me that it wouldn't be the subject of argument,

and to say that I have to spell out here in proof as a condition to going forward with this lawsuit, that something Mr. Keeshin did wasn't as good as Mr. Parmelee did or Parmelee's company did, just does complete violence to the entire purpose of the anti-trust laws.

You are putting hurdles here, if that is done, where
23 the private litigant has to try his case piece-meal.

It has always been the strategy of the defendants in anti-trust laws to cut the conspiracies up in little bits and look at one little piece at a time, and say, "This is valid, and that is valid, and the other thing is valid. As long as each little piece is valid, the over-all thing can't be invalid."

That has been a stock argument. You expect that, and that is an argument, but here it is an attempt to divide up and cut up and segment and put into little pieces a lawsuit so that I can't tell a jury, and I can't get before the jury at the outset what this lawsuit is about, and this lawsuit is about a vicious conspiracy to stop our client from competing for this business, and they succeeded, and it monopolized this business for a period of some five years.

That is the kind of public injury we show by our proofs, and that we are ready to show by our proofs, and the Supreme Court of the United States has said in as distinct words as can be stated that that is all that I should be required to prove.

That is all the Congress requires me to prove, and the Courts shouldn't interpolate other hurdles and other things which I have to go over or get beyond as a condition precedent to showing this jury what this lawsuit is about.

24 The other case I want to refer to is the case of Klor's *v.* Broadway-Hale Stores, which is a very recent case. That is 359 U.S. 207, 3 Law Edition Second, 741.

This case went up from the California Court of Appeals in San Francisco on a case which was decided on summary judgment.

Klor's operated a retail store which had to do with electronic goods, radios, television sets, refrigerators and other household equipment. Broadway-Hale Stores had a chain of department stores and operated one of its stores next door to Klor's.

Klor's brought an action for treble damages against the Broadway-Hale Company and a number of manufacturers and distributors of electronic equipment. Some of them were General Electric, RCA, Admiral, Zenith, Emerson, and others. He alleged a conspiracy whereby Hale's used its buying power to exclude the sale of these electronic goods to Klor's.

Now, in the face of that complaint, affidavits were filed to the effect that the public wasn't damaged because they could buy the goods, plenty of outlets to get the goods. They weren't injured in any way because of prices. They weren't injured in any way because of the quality or the quantity of the goods, and that therefore the case should be dismissed.

25 The lower court, on the basis of these affidavits, dismissed the case, and the case went up to the Court of Appeals. The Court of Appeals affirmed it, and said that there was no specific injury done to the public in this instance, and therefore theman hadn't made out a case; that it was purely a private quarrel between Klor's and Broadway-Hale Stores.

26 I am reading from page 743 of the 3 Law Edition 2nd., from the Supreme Court's opinion:

"The court of appeals for the Ninth Circuit affirmed the summary judgment. It stated that 'A violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately

injured.' It held that here the required public injury was missing since 'there was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality. * * *

"The holding, if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively. We granted certiorari to consider this important question in the administration of the Sherman Act." Then they say this, and this is our case:

27 "We think Klor's allegations clearly show one type of trade restraint and public harm the Sherman Act forbids, and that defendants' affidavits provide no defense to the charges. Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade, and Section 2 forbids any person or combination from monopolizing or attempting to monopolize any part of interstate commerce. In the landmark case of Standard Oil Co. v. United States, 221 U.S. 1, this court read Section 1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. The court construed Section 2 as making 'the prohibitions of the Act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof. * * *"

28 "The effect of both sections, the court said, was to adopt the common law proscription of all 'contracts

or acts which it was considered had a monopolistic tendency' and which interfered with the 'natural flow' of an appreciable amount of interstate commerce."

Citing Eastern States Retail Lumber Dealers' Association v. United States.

"The court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their 'nature or character' were unduly restrictive, and hence forbidden by both the common law and the statute. As to these classes of restraints, the court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred.

29 "Group boycotts or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."

Now, what are we trying to prove here? That is exactly what we are trying to prove, that these railroads conspired together, the conspiracy occasioned and triggered by Cross' use of his influence on the Interstate Commerce Commission to importune them into joining, shoulder to shoulder, against Keeshin and reverse their position; where they had already approved a contract with Parmelee or signified their readiness to do so, to change their position and to write one for Keeshin instead.

Right within the scope of this decision, that is exactly what we are trying to prove, and you can see why I have some slight quarrel with any ruling by this Court which would prevent us from showing that conspiracy on the theory that we have to get over some other outside hurdle, clamber over that, before we can get to our constitutional right to a trial by jury on the issue of conspiracy here to put my client out of this business, which it did.

The court goes on and says -- once this is shown,
30 just what I am talking about, group boycotts, group refusal to deal, evidenced here by a contract in which they all agree not to deal with Parmelee for a period of five years.

This sort of thing, the court says,

"They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality.'"

31 They cite the Fashion Originators' Guild *v.* Federal Trade Commission.

"Even when they operated to lower prices or temporarily to stimulate competition they were banned."

Citing Kiefer-Stewart case.

"Such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

Then the Court says:

"Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the
32 defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made avaliable to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It inter-

feres with the natural flow of interstate commerce. It clearly has by its 'nature' and 'character', a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact, the Sherman Act has consistently been read to forbid all contracts and combinations 'which tend to create a monopoly,' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.'"

They reversed the judgment of the court below and sent it back for trial.

33 Now, what are we talking about here? We are talking about a monopolization of the entire stream and segment of the commerce, all of it, every bit of it, from the eight different terminals in the City of Chicago — six largely control it — all of the transfer of interstate passengers from one terminal to the other and their baggage is by this method controlled.

Our competition, as Judge Sullivan pointed out in his opinion on the sufficiency of the complaint for contracts with individual railroads or the group, or to be allowed to compete for this business in any manner was excluded under the allegations of this complaint by conspiracy, an illegal act under the Sherman Act.

34 It seems to me that the public injury is so obvious in that situation that I shouldn't even have to argue it here.

Now our position is this, and I don't think your Honor is going to misunderstand me when I state it as frankly and clearly as I can state it — I may have some other attributes which are not so good, but I don't think people

have any trouble understanding what I have to say. I may be overstating my position in that, too, I don't know.

But we are here with a serious lawsuit. We are here with a client who was in this business 102 years; not the same management, obviously, but the same operation, serving these railroads faithfully over the years.

We have come into court here alleging a very vicious conspiracy, one inspired and carried out and fomented and importuned by a high government official.

This should be a forum where we could have that lawsuit tried without being hemmed in and penned in with a lot of artificial restrictions, dreamed up by counsel on the other side, whereby we are not given an opportunity to tell this jury what this lawsuit is about.

35 I can't believe that your Honor wants to hamstring me in the presentation of this lawsuit. We are here in a serious capacity. We are an officer of this court. We are not here with a frivolous lawsuit. We want to try it, and that is not an objectionable request —

By the Court: There is only one correction. This was not dreamed up by the counsel on either side. It came from the court on its own motion, free and voluntary in open court, and nobody has indicated to this court. This is the rule that I invoked in this court, the separation of issues.

That is the only correction I want to make. I am listening to you.

By Mr. McConnell: Of course, I have to accede to your Honor's statement on that.

By the Court: Yes. That is a fact.

By Mr. McConnell: But because your Honor says it or states it, and I say this with all due deference to your Honor, doesn't lessen my duty in one iota to contend here with all the energy and all the seriousness that I can muster that such a ruling deprives this litigant of his day in court.

By the Court: I have no objection to that contention. None whatever. Make it as emphatic as you
36 can and as legal as you can.

By Mr. McConnell: It is our position that we have a constitutional right to appear here and try this lawsuit the way lawsuits are usually tried and even courts, and I say this with all due deference, have no right to tell me, the lawyer for the plaintiff, how to try this lawsuit.

I have a right to try this lawsuit in a way that can best present the issues to the jury and to the Court. With all due deference which I have for this Court, it is not the province of the courts to tell counsel how to present their lawsuit, if they are presenting a serious lawsuit.

Of course, if I am in here with some frivolous contention, which is just wasting your Honor's time and the time of the jury, that is one thing. How am I wasting time by asking the jury to hear issues which the Supreme Court of the United States says are the only issues?
37 If I understand your Honor's ruling, it is on the basis of trying to save somebody's time, and the Supreme Court says that a private litigant has a right to show a violation of this statute, and when he shows that, that is all the court should try to make him do. That is what the Congress said he had to do. That is what the Supreme Court says he has to do. I am asking this Court to follow the rules of the Supreme Court.

Now, I don't know why, and I am not charging anything against your Honor, where you get your ideas or anything else, but somebody, it seems to me, is always working overtime to emasculate the anti-trust laws for some reason or other. I don't know any better way to do it than this, to compel a litigant to try his case in little bits of dribs and dabs, and to preclude on the issue

of public injury what the Supreme Court says is involved in it.

I feel, and I feel it very deeply, that this can only result in depriving this litigant, at least for the time being, of a day in court on a very, very important public issue.

Here we have all the railroads of this country practically — there are twenty-one railroads in this Ter-
38 minal Association, which are involved in this conspiracy through their Committee of Six — charged with conspiring with a public official, a member of the Interstate Commerce Commission. That issue can't be heard here under your Honor's proposed ruling on the ground that we have to show some other public injury.

It would seem to me that in an anti-trust case, at least, it has been a long, long time since any issue of greater importance has been presented to a court, where the railroads of this country and all of them can conspire together with a public official to prefer one competitor over another, and using the clout, if I may use a slang expression, of that great Commission, to compel the railroads to fall in line with that sort of a violation of the anti-trust laws. Your Honor is proposing a ruling where that can't be shown.

39 I will say that it is a terrific injustice to my client. It deprives him completely of the chance to try the case which he has brought in your Honor's court. I know nothing in the rules of the Supreme Court, nothing in the law of anti-trusts, and there is no convenience served except the convenience of these defendants to try an irrelevant issue. I say that advisedly, an irrelevant issue, because if we prove under the doctrines laid down by the Supreme Court that by conspiracy and by monopoly we have been precluded from competing for an important segment of interstate commerce, that that doesn't con-

stitute a violation of the Sherman Act unless we go further and preliminarily as a condition precedent to our right to a trial by jury, prove that by quality or quantity or the service or something else, the public was specifically damaged in dollars and cents.

I don't know any other way to state it than I have stated it. If your Honor can't see the vast overriding public interest and public policy involved in this situation, with its consequent effect on the rights of litigants under the anti-trust laws, to divide up their lawsuit in little segments, there is just nothing I can do about it.

40 I have stated my position, and that is it, and I say it with all due deference to your Honor. I don't impugn your Honor's motives in any way in taking this position, but I want your Honor to understand the implications.

By the Court: I understand them fully.

By Mr. McConnell: I submit that we are entitled to try our lawsuit here just like other anti-trust cases have been tried in these courts.

I know of no case that says that we have to try this bit by bit, piece by piece, and try an irrelevant issue before we get to our lawsuit, and I submit we shouldn't be compelled to.

41 We shouldn't be put under that sort of a condition, presenting the rights which we have and which are guaranteed us by the laws of this land in this court.

By the Court: Does anybody else want to add anything to this argument?

By Mr. Thompson: If the Court please;—

By the Court: Judge Thompson.

By Mr. Thompson: I hope I can present the position of the defendants, at least those defendants I represent, and I hope of all defendants on this question without blowing a gasket and without any insinuations or any

innuendos or anything else which have nothing to do with the matter at this stage.

Mr. McConnell has well presented the position of the plaintiff in this case on this question, and so far as I am speaking for the defendants, I shall make no comment on his conclusions and deductions from the cases that have to do with the law in this situation.

I want to join him in opposing the splitting up of this case into segments and trying this issue at this time in this fashion, because I consider it to be very much against the interests of the defendants, and that the defend-
42 ants will be denied an opportunity to bring to a close what we regard as a case with no merit at all, a case built on the same sort of suspicions and creations of feelings of vengeance, just as has been the discussion before your Honor this morning, based on suspicions and aversions to counsel for the defendants.

We think that this case ought to be disposed of once and for all. It was filed against these defendants more than four years ago. Circumstances have delayed the trial, over which this court certainly had no control and over which these parties had no control, these defendants.

Plaintiff brought the case here. The defendants are here in response to a case brought against them. They are obliged to defend themselves.

We think we can defend ourselves successfully on the issues that are presented by the complaint and the answer. The contract which is in issue here expires this October 1.

Every day of delay adds to the liability asserted of damages, and we want it disposed of and disposed of now and not take the chance even of having a segment of the case tried here and determined and then reviewed and even a chance of its being reversed on review so we
43 will have another year delay in disposing of the lawsuit.

The case is at issue and ready for trial. Parties are all prepared for trial. We can try the whole case as quickly as we can try this segregated part of the case, and we can have a case presented at the end of the plaintiff's case which may dispose of the lawsuit, because we think the plaintiff will utterly fail to prove any conspiracy, even a good suspicion of one, or any boycotting or anything else that is a violation of the anti-trust laws.

We want it presented in that fashion. We want every facet of the case tried. We want it submitted to the Court at the conclusion of the plaintiff's case as to whether they have even come close to proving a case.

If the Court feels at that time that they have made a prima facie case, of course, we will present our defense.

We think it would be highly prejudicial to the defendants to have submitted to them the single question of whether there was public injury. We think the facts are as they will develop before the plaintiff finishes its case, that this as a case solely of private complaint.

We think in order to submit to the jury, so far as the defendants are concerned, this question of whether there was public injury as a separate and distinct issue, carries with it the assumption that there is some case back of this issue of whether there is public injury, that is the assumption that there may be a conspiracy here and there may be a boycotting and there may be a lot of other things, but if there is no public injury, then, of course, the verdict should be for the defendants.

If that kind of an issue is submitted, then the defendants have to face this argumentative assumption, that these other things exist, when we think they do not exist, and there is no conspiracy.

By the Court: What was your position before Judge Sullivan, Judge Thompson, in your briefs to strike the complaint?

By Mr. Thompson: Our position was the complaint did not state a cause of action.

By the Court: What were your specific allegations?

By Mr. Thompson: We think it does not state a cause of action, but it was decided that it does, and the Supreme Court of the United States —

By the Court: What would have happened to the charge against your clients in a conspiracy if the
45 Judge had sustained the motion to strike?

By Mr. Thompson: Then it would have been taken up, I suppose.

By the Court: That was your motion, Judge Thompson, and I have read those briefs.

By Mr. Thompson: Certainly, it was my motion, and I still believe the complaint doesn't state a cause of action, but the Supreme Court of the United States, which has an opinion beyond mine, said in the Klor's case,

"If you write a letter to the court and say you have a complaint against somebody, that is enough."

I think that is nonsense, but that is what it says, and a lot of district courts think it is, too, by their opinions.

I don't want to take the chance at this late date, four and a half years or five after this case has been started, that we go up and come down again and try this case all over, because we are ready to try it now. We have everything ready on both sides, I assume. It has been long enough getting it ready.

I think we have it ready, and I want to try it. The defendants want to try it, and we want it disposed
46 of. We think it can't be disposed of by this splitting of the issues without seriously prejudicing the defendants, and the idea of the defendants going on before the same jury to defend themselves against the balance of the lawsuit, if they find against the defendants on this separate issue of whether there is public injury, is just one that I can't accept at all.

The defendants just couldn't have a fair trial after that sort of a thing if that happened, and I must confess that I don't know where the boundaries are on thise separate issue, what we would be trying and what would be presented to the jury and how it would be presented and how the instructions would be presented, separating it from the other fragments of the case.

Anyway, your Honor, the defendants want this case tried on all the issues at this time, and we hope your Honor will, on further reflection, allow the parties to go ahead and finish the job at this late date.

That is only one issue. I have other matters I want to present as far as pre-trial is concerned.

By The Court: Let's go ahead.

47 By Mr. Thompson: The other matters I want to present, as far as pretrial is concerned, are—

By Mr. Meserow: May I interrupt and answer Mr. McConnell very briefly before you go into the other matters?

By Mr. Thompson: If you think you can, go right ahead.

By Mr. Meserow: If the Court please, I am only speaking for my clients, the defendants John L. Keeshin and Railroad Transfer Service, and partially I join with my colleague, Judge Thompson, in saying that there have been many accusations here over the past four and a half or five years about the defendants and what they did.

Mr. McConnell made some today, and we would welcome a full and complete trial, because we feel that the plaintiff could not prove its case, and we feel that we could adequately present a defense before the jury, and your Honor.

However, your Honor, maybe I have not reached the stature, especially in age, of Mr. McConnell or my good

colleague Judge Thompson, but I believe the law is a progressive science. It is not static, and it changes, and when Mr. McConnell says to you that he has never
48 heard of an anti-trust case that has been tried piecemeal, that may have been true in the days when he tried his first anti-trust case, the Jackson Park Theatre case, but that was a long time ago.

Since then there have been progressions made by courts in their rulings.

Your Honor, in the motion to dismiss, which the defendants filed before Judge Sullivan, they did raise the fact there were not sufficient allegations of fact of public injury. That was overruled by Judge Sullivan. That does not preclude your Honor from determining what the issues are here at this time.

As a matter of law, since Judge Sullivan passed upon overruling the motion to dismiss, the plaintiffs—not the defendants, but the plaintiff filed a motion for summary judgment, and they based it solely upon the theory that the Keeshin contract with the railroads was void and was contrary and in violation of the Anti-Trust Act. This Court overruled that motion.

If we want to argue, and we don't know now, we could say there was no, per se, violation by reason of that ruling, and therefore they must prove public injury, but let's forget that.

49 They, in their complaint, the plaintiffs, they put in the question of public injury. We did not. They made the issue, and we denied it. There is an issue of public injury here.

Now, Mr. McConnell says he is being deprived of his day in court. I don't think that the ruling of the judge in this court, the proposed ruling of trying separate issues, and may I say that there are, that this Court has ample

authority for trying these cases separately, and even the case that your Honor cited, the Marks Food case of the Second Circuit says:

"In the consideration of these points we must first note the trial court in the proper circumstances has a right to order a separate trial, trials for separate issues in the same case."

They cite authority for that.

There are many cases holding that you may try separate issues in the same case. Public injury is recognized as a separate issue in this case.

50 It is one issue, yes. The conspiracy and all the rest, as Mr. McConnell says, are other issues, but if this Court and a jury should hear and try the issue of public injury, that does not preclude this Court or Mr. McConnell from going ahead with the other issues, with the complete case. It doesn't stop him.

It depends on what the jury will decide. If the jury decides there is a public injury, Mr. McConnell has full time to go ahead with the rest of his case, so that he is not precluded. He has his full day in court.

I say, your Honor, and I don't want to go into a lot of cases, but the Klor's case and the Radovich case cited by Mr McConnell, they were decided on the pleadings.

This Court, in its proposed ruling, is going further. It is not depriving Mr. McConnell of his day in court in deciding the case merely on the pleadings, but it is giving him a jury trial, and I, for one, again I say that I join with my colleague, Judge Thompson, in saying we would welcome the opportunity for a full dress trial to vindicate ourselves here from all these false accusations that have been made, but I say this to your Honor, that I think there is ample authority in the law and in the

51 recent cases, and I think the case that was cited by your Honor in this circuit, the opinion by Judge

Castle in the Radiant Burner case is directly in point with the proposed ruling of your Honor.

Thank you.

By The Court: All right; Judge Thompson.

By Mr. Thompson: I think I have already made my position clear on this other. Of course the Court has authority to divide issues. Nobody has questioned that. The question is whether the defendants will get a trial, a fair trial if it does, and I think they will not, and I am opposed to dividing the issues

There are other matters that are to be covered, I think, by pre-trial conference in any case of this character, which would be the following:

We have here a lot of witnesses whose depositions were taken in the course of pre-trial procedures, who are scattered all over the United States from the Mississippi River to the Atlantic Ocean, and obviously we don't want them sitting here in the court room all the time, but we do want to cooperate fully with the plaintiff's counsel in having them here as, if and when they want them.

We don't even know yet whom, among all of those
52 people, are to be examined. They have been very courteous in advising us those that they think they will need during the first week of the trial, and those arrangements have been made by agreement.

We think that without the Court having anything to do with it, counsel on both sides will agree on this schedule, but if there is any doubt about it, I just want the Court to know that we are prepared to produce such witnesses as we are under any obligation to produce upon a proper arrangement, but we don't want any implication to arise, by virtue of some witness or even some defendant not being in court, and I assume counsel will respect that situation.

For instance, Mr. Simpson, the president of the Baltimore & Ohio Railroad, will undoubtedly be a witness, but he is running a railroad, and he certainly can't be expected to sit in the court room from the time this case starts until it finishes.

I don't want any references made to the fact he isn't here.

By The Court: How long do you think the whole case will take? I am asking both counsel.

By Mr. Thompson: I have no idea, of course.

By The Court: What is your best guess?

53 By Mr. McConnell: I would guess we can put in our case in two weeks. I think we can put in our case in about two weeks.

By Mr. Thompson: I gathered from the witnesses that had been noticed to be produced, that they had planned quite differently than what had been in mind perhaps earlier, and that they would probably put their case in in a couple of weeks or so, and if that is so, I should think ours wouldn't take any longer, and we would be through with this in four weeks, whereas it looked like it was going to take six weeks or two months at an earlier period in this preparation.

By Mr. McConnell: I will assure Judge Thompson I will cooperate with him in any possible way so that these witnesses will not be inconvenienced.

By Mr. Thompson: Nor will any defendant be embarrassed by his absence that you have not asked for?

By Mr. McConnell: You will have no problem with that.

By Mr. Thompson: I was sure of that, but I wanted the Court to understand these defendants are not in court because they are treating the case with contempt, but it is because they have something else to do.

54 The No. 2 point on my agenda is the matter of peremptory challenges. The statute says and has for a good many years that where there are multiple defendants, that the Court may allow, in addition to the three statutory peremptory challenges, challenges to be exercised by the defendants jointly or by individual defendants separately, and there is also an amendment to the statute later that makes the situation as to multiple plaintiffs the same.

Of course, in this case there are no multiple plaintiffs, and so plaintiffs are limited under the statute to their three peremptory challenges, but as to the defendants, there are quite a lot of them here, and as you can see—

By The Court: How many defendants all told?

By Mr. Thompson: There are six railroad defendants, four presidents, being ten, and two is twelve, one is thirteen, and one is fourteen—fourteen defendants.

By Mr. McConnell: There are thirteen.

By Mr. Thompson: You forgot the Railroad Transfer Service.

By The Court: What would you consider a fair allocation on challenges for the defendants?

By Mr. Thompson: Your Honor, the five railroads
55 that I represent and the four railroad presidents that I represent with my office associates, and I think the New York Central is separately represented, but I think as far as the railroads and railroad presidents are concerned, we don't need any extra challenges, if there are extra challenges accorded.

I would say there are three groups, the railroads and the presidents, Mr. Keeshin and his company, and Mr. Cross, and I should think they ought to have at least three each.

56 That is, that there should be nine peremptory challenges by the defendants to be exercised jointly or

separately, because Mr. Cross' interests are certainly different than those of the railroad defendants and presidents, and the Keeshin Transfer Company's interests are distinct.

Their defenses are different, and I should think they need nine altogether on the defendants' side. Whether they will ever be used or not is something else, but there is no such thing as matching the defendants' extra challenges with plaintiff's as I understand the law.

By The Court: What do you think ought to be done?

By Mr. McConnell: I have a hazy recollection of having read somewhere a case where there were multiple defendants, and unless they showed a diversity of interest, that they wouldn't get any more peremptory challenges than the opposing party, but that is just a hazy recollection. I can't cite the case.

By The Court: Suppose I allow them the nine, what would you expect as a fair allocation for you?

By Mr. Thompson: They are not entitled to any extra.

By The Court: I know, but I can exercise my discretion in allowing it.

By Mr. Thompson: The statute doesn't give it to you.

57 By Mr. McConnell: I think Judge Thompson is right on that. I don't think we get any more than three.

By Mr. Thompson: As to the case, you and I can both cite cases on any point like the devil can cite Scripture for his own purposes.

By Mr. McConnell: As you very well know, and you are very well accomplished at so doing.

By Mr. Thompson: That is right, but I didn't cite any this morning.

The next point I have—

By The Court: Let's make it nine and three.

By Mr. Thompson: All right, nine and three.

The next point is the examination of jurors. Does your Honor plan to allow counsel for the respective parties to question the jurors on voir dire?

By The Court: Yes; I intend to follow my usual procedure here. I talk to the jurors about ten minutes on the general principles, and I let each counsel interrogate, reasonably limited, on their own individual points of view.

By Mr. Thompson: The next thing is the matter of expediting this examination of jurors. I find, as far as my experience is concerned, which is somewhat limited, that if I have a list of the jurors with their names and addresses of the panel that are immediately to be
58 called in front of me, it saves time writing down the names and writing the addresses, and it is right in front of me.

I don't know whether we have available the list of the jurors that will be called into the box.

59 By The Court: We don't have a typewritten list, but I have a list here of those that were given to my deputy marshal this morning. I suppose my secretary could make up a list of them.

By Mr. Thompson: It is a convenience, don't you think?

By Mr. McConnell: Yes, a great convenience.

By The Court: We will make up a list. We ought to have at least twenty-four available.

By Mr. Thompson: Of what?

By The Court: Twelve jurors to be picked, nine challenges and three challenges being twelve, and twelve and twelve is twenty-four. We ought to have at least twenty-four available jurors, and I will probably give you a list of twenty-six or twenty-seven.

By Mr. Meserow: Could we have additional copies?

By Mr. Thompson: All we need is three or four copies. We don't need a copy for everybody around the place. We need a half dozen copies, I suppose three on each side should be enough, isn't that right?

By Mr. McConnell: Yes.

By The Court: Let's talk about alternate jurors. If you want, you may stipulate that in the event of in-
60 capacitation of one or two jurors, you may go on with ten or eleven, or you may have an alternate or two, so in case one is incapacitated, one can fill in and take his or her place.

By Mr. McConnell: I can't cite the case, but I do know we are entitled to an additional challenge on the alternate jurors.

By Mr. Thompson: That is right.

By Mr. McConnell: I would suggest three alternates. It is going to be a four-week trial anyway.

By The Court: I don't think you need more than two.

By Mr. Thompson: Two is all, and I have no objection to selecting two alternates. I doubt if we will need them, but I have no objection to it.

By Mr. McConnell: The last jury case I tried a year ago, we lost four jurors in the course of it with sickness.

By The Court: All right; I will let you use up your three on the original panel, and then if you need one extra on the alternates, you may have it. That goes for you, too.

By Mr. Thompson: That is the statute, I think.

Another thing is that there are a lot of exhibits in this case. I don't now how many will be offered, but
61 three or four thousand were copied and marked, and I think if we can work out some system by which exhibits could be marked instead of having to leave them or go to the Clerk every time, or the reporter, which takes an

awful lot of time, if it is agreeable, I should think we could mark our own exhibits.

By The Court: Suppose I give you from now until Monday morning to mark all the exhibits before we start in picking the jury and get ready for your trial?

By Mr. Thompson: I was going to inquire whether it is agreeable we do mark our own exhibits.

By Mr. McConnell: That is fine.

By The Court: If you can spend the day and a half—

By Mr. Thompson: It won't take that long.

By The Court: All right; what is next?

62 By Mr. Freeman: Your suggestion, Judge Thompson, is that we mark them numerically ourselves and we will advise you of those as we go along instead of handing them to the reporter?

By Mr. Thompson: That is right, as Plaintiff's Exhibits 1, 2 and 3, and go out as far as you please, and we will mark ours as the Defendants' Exhibits, and I don't know whether they should be lettered or numbered.

Some courts require that you use both, but the trouble is you run out of letters so quick. I got to quadruple "X" in Denver in trying a case recently, and I don't like 28 letters multiplied by four, and I see no reason why Defendants' Exhibit No. 1 isn't as good as Defendants' Exhibit A.

By Mr. Freeman: Yes, that is right.

By Mr. Thompson: The next thing I have in mind is this matter of when we offer an exhibit in evidence, I should think we ought to furnish the other side with a copy of the exhibit then and there, unless we or they already have it. I am inclined to think we all have duplicates.

By Mr. Freeman: We all have duplicates, but we will identify the exhibits so you can pull your duplicates out.

Otherwise, we will give you a duplicate. You don't
63 expect we will give duplicates to all the counsel, and just one duplicate for your side will be enough, if you don't have it already?

By Mr. Thompson: One duplicate to my side, if given to me, will be enough for me. I don't think we need one for everybody.

The next thing I have in mind is that the Court has ruled on pre-trial on a lot of documents, a great mass of these documents, and I assume, of course, that if, in the course of the trial, counsel thinks that one of these documents is, in the light of the development of things, material and competent evidence, he can offer it, so the Court can rule specifically on the particular document, but I should think that these documents, as they are offered, ought to be offered only with identification, if the Court has already ruled on a group of documents, and not any statement made or question asked respecting the document which discloses the document's character until the Court has had a chance to rule again.

That, I think, is essential that no document which the Court has already ruled is immaterial should be disclosed to the jury but should be identified so the Court can rule, if it is desired to have the Court rule again.

64 Another thing is the opening statement to the jury. I appreciate that attorneys, with the experience of those in this case, ought to know how to stay within bounds, but here is a case where there is still, I suppose, a dispute as to whether certain of these documents are or are not to be received in evidence.

65 The Court has ruled, and it has ruled firmly about it, but I assume that they may want to offer some.

As to all the documents where the Court has ruled, I think there should be no reference to the documents or any

reference to the subject matter of the documents in the opening statement, because there is just no way to protect ourselves.

For instance, in an opening statement if they start talking about Interstate Commerce Commission proceedings and actions, which the Court has ruled are not material in this case, and we think correctly so ruled, they may want a new ruling on that in the course of the trial, but certainly, in the opening statement nothing should be said about those things, about Interstate Commerce Commission proceedings or rulings.

The same thing is true about the private transactions of Mr. Cross, which had to do with his real estate transactions. Certainly, nothing should be said about those things in the opening statement, because it is much worse if they are said in the opening statement and then they are ruled out on the trial as we have no chance to meet them at all. The poison has already been injected and the harm done, and it is worse than if there had been no ruling at all.

I feel the opening statement ought to be limited to those things that are not at this stage in contradiction, and each side can certainly outline in general its position in the evidence it produces, but this thing of making a horrendous opening statement in which all the stops are pulled is something that just never can be gotten out of the jury's minds, whatever the evidence received or rejected is, and the defendants can't have a fair trial in this case if that sort of poison is injected in the opening statement when we don't have a chance to get rulings, and the same thing applies to the other matters on which your Honor has already ruled.

They know what they are, and I don't need to detail them.

The same thing is true with respect to the subject matter of these documents on which the Court has already ruled are in a field that is immaterial and irrelevant to the issues. Certainly no questions ought to be permitted to the witnesses in the presence of the jury respecting those issues until the Court has had a chance to rule on them, because the mere asking of a question which the Court sustains the objection on is sometimes more
67 damaging than if the objection had never been made.

All offers of proof should be made out of the presence of the jury. That ought to be so in any case.

I think that is all I need to bring up now. I don't think we need any more pretrial rulings, but those are just usual things that ought to be ruled on, I should think, in a case of this character in order to lay down the rules at the outset so that everybody will have a fair trial. That is all we want.

By Mr. McConnell: All I want is a fair trial. I am just as much interested in protecting my record as Judge Thompson is in his. I am not going to present anything here to the jury that I can't within the rules and your Honor's rulings legally present.

By The Court: Well, the only question here is, as counsel brings out, on the areas of admissibility of documents that I have ruled upon, no reference should be made before the jury until such time when either I change my ruling or they become admissible for some other reason.

68 By Mr. McConnell: I don't think your Honor has to worry about it.

By The Court: I am not worried about it.

By Mr. McConnell: I think Judge Thompson has to worry about what I am going to do with the opening statement.

By The Court: Have both statements of counsel joining with you in opposition to a separation of issues answered your unwarranted charge?

By Mr. McConnell: What unwarranted charge are you referring to now?

By the Court: That it emanated from the defendants.

By Mr. McConnell: Oh, I accepted that when your Honor stated it.

By The Court: I know, but there couldn't be any greater corroboration of it than their getting up in open court and saying they are against the separation.

By Mr. McConnell: I don't need any corroboration. When your Honor states it, that is enough for me.

By The Court: That statement was a reflection on the Court and on counsel, and I resented it. I do not ordinarily take those kinds of insults from lawyers, and I don't want it to go unchallenged.

All right, now, on the question of the rule. Nobody has talked about the Castle case. Nobody has talked about
69 that opinion that cites the Klor's case and takes in all the cases that you have cited there.

I have no purpose in invoking the rule except my general purpose in sustaining a rule which has been sustained in the Second District in an anti-trust case only recently.

In reply to your emotional argument that your clients will be deprived of their right to trial by jury, if you don't give them a chance to hear all of the evidence, we have heard that same charge in a presonal injury case: Why don't we want to inject the extent of damages and injuries into the question of liability?

I said there, and I can say now—though I am not prepared to rule on it. I will look into it again and I will rule on it specifically one way or the other.

70 Some of those issues, if they are improper, don't belong in the trial of another issue. There is no more

reason why the element of conspiracy goes into the charge here, if there is or isn't public injury, and, as Judge Castle said only a few weeks ago, public economic injury.

Judge Castle has answered your argument completely and fully. The Klor case has been cited. The Rogers case has been cited, and all the cases that you have brought up have been cited in there.

Yet Judge Castle precisely in an anti-trust case ruled very specifically, and on the pleadings, not on the trial. I haven't ruled on the pleadings. I haven't indicated how I feel about the pleadings. I have read the briefs. I have read the pleadings. I have read the appeals of the Parmelee case to the Court of Appeals and to the United States Supreme Court. I have read every phrase of it. I am familiar with it.

Separation of issues is not a hardship in my judgment, nor in the other courts' judgments in the adoption of our rule. It is not to save any time primarily, but to squeeze unnecessary sympathy or prejudice from the trial of issues where sympathy and prejudice do not belong and have no place therein.

71 I am familiar with the Congressional Act on anti-trust laws, and they don't require proof of public injury when there is a restriction of production and a raise of prices, which are prima facie proof that the public is being injured somewhere along the line.

It is paramount, and they have defined it, and Judge Castle did not evade it and did not try to go around it. But he said there are some cases specifically that don't come in that category.

I have given that a tremendous amount of thought, and I am going to consider now whether I was right or wrong in holding in this case. I don't have to review the facts. I am not impressed with the argument that this is a

great conspiracy—I want to get the exact words—to restrict trade by monopoly.

72 Now from the pleadings and from the cases before the Court of Appeals and the Parmelee case before the Supreme Court of the United States, the question of monopoly on the contract by one company doesn't enter into it and doesn't belong here. It was a monopoly before the present winner of the contract got it, and it was the same exclusive operation by the same company.

Whether or not the railroads have a right to act concertedly, that has been answered by the Supreme Court time and time again. They have got the right to do it.

Whether or not they have the right to give that contract to one person, that too has been ruled upon in the cases. The courts are replete with those citations. It is a valid contract, unless you disturb it by something else that you bring into it.

That is what I meant when I addressed myself to Judge Thompson, when he raised the question before Judge Sullivan originally that if the contracts were legal and proper in the first place, acted upon concertedly by the railroads, which they had a right to do, given to one individual, which they had a right to do,—there is nothing

73 that could have happened prior thereto that could have made that contract invalid so as to be answerable to a private party who lost the contract.

I have read all that is to be read in this case. As to the monopoly phase of it, giving the contract to one company or to the other, it would have been a monopoly one way or the other. It was in the hands of one company all the time, and the railroads, as I say, had a right concertedly to give it to one company or another company if they wanted to.

You said something about the Court trying to emasculate the anti-trust laws.

The Court is very mindful, very conscious of a public wrong, if it involves corruption. This Court will never condone under any conditions any type of corruption by any public official or by anyone else, individually or collectively, to defeat the laws or to impose upon the public.

The problem in my mind is whether or not they belong under different laws, if such a charge is made. Your argument is based on the theory that you have proved it, and that I am depriving you of the chance to give it to the jury.

All I said was, and all I am thinking about is, that greater justice will be done if we follow the Judge
74 Castle opinion.

I am going to give it some thought between now and tomorrow morning. Judge Castle is just as conscious of public rights as I am, and I am mindful of it, and I have read the cases. The Rogers case is a strong case against it, and he differentiated there. The Klor case, that case was held on the pleadings, not on the proof.

75 I see nothing wrong, nothing improper, to say to both litigants, on the motion of the Court, "Let's get down and try the issue where it belongs, to determine whether or not it belongs under the anti-trust laws."

That is in answer to your charge that you made that I am trying to emasculate the laws; that I have been inspired in my ruling by the defense or someone in that camp.

I want you to know that I have given this thing a lot of consideration. I have studied the briefs. I have studied all the cases. I have followed you carefully on it.

I don't blame you for making that kind of an argument on the law, I mean, but I am not sold on the idea that this comes within the Anti-Trust Act. I haven't been asked

to review Judge Sullivan's ruling, but a lot of law has come out since that time. I will give you five or six cases that have held just adversely to what he ruled in those matters. I am not going to rule upon it.

It is before me. I am sustaining the pleadings. I am letting you prove it. I will decide tomorrow morning whether it is a separate trial or a trial on all the issues.

If you want until Monday morning, I will give
76 you the time until Monday, not to rush you, and I will tell you why. It is a weekend. You might take the whole day tomorrow to pick the jury, and go on Monday morning with the trial.

By Mr. McConnell: If we are going to have a ruling Monday morning, I suggest we go to Tuesday because—

By The Court: I am going to give the ruling tomorrow morning. I will be ready this afternoon, but I want you to spend your time on the exhibits.

I would like to say one more thing. We have had the same situation of wrangling on the rulings on the admissibility of documents, and I have to review page by page and reference by reference to refute the charges made on those rulings.

This is just another lawsuit. I know it is an important lawsuit. If you come within the anti-trust rules and regulations and the Act of Congress, it is most important to the public, vitally important. I want to give it all the consideration with all the fairness that each party has coming to him, fully, and with no limitations, but within the confines of the law as I see it, without haranguing and without abuse.

All right, tomorrow morning.

77 By Mr. Thompson: If the Court please, I think your Honor ought to know that counsel suggested we have Mr. Feucht here as one of the early witnesses, and Mr. Feucht is here. He is the Deputy Secretary of the

Army, and of course can't be away from Washington any more than he just has to be.

I didn't want it to go over to Monday or Tuesday—

By The Court: Tomorrow morning.

By Mr. Thompson: Tomorrow morning, maybe we can get through with him. If not, we can have him on by Monday.

By Mr. Owens: Your Honor, I represent Mr. Cross. I haven't spoken so far, and we are interested. Mr. Cross has been under a cloud since this started. These unfounded charges have been made against him, and we are interested in getting this issue tried.

We feel the issue which the Court is now talking about, whether or not it is a question of competition here or the creation of monopoly, can be disposed of only with a full hearing of this case, and we would like to have it heard, and not incur the problems of a retrial at a later date.

By The Court: My opinion has been that in our system of jurisprudence, whether civil or criminal, a
78 charge of fraud or irregularity or conspiracy hasn't any standing until it is proved, under our system.

By Mr. Owens: That is true, but—

By The Court: I am not concerned so much with vindicating anybody or following the wishes of either side. I am here to administer justice as I see it, and if I think for one minute that that is the way, I am going to follow it.

You have helped me by saying it is only four weeks instead of four months. I was under the impression all the time that this was a four-month or three-month case.

I will decide it tomorrow morning. Eleven o'clock, gentlemen.

(Thereupon an adjournment was taken to 11:00 o'clock, a.m., of the following day, April 22, 1960.)

79

* * (Caption—No. 56 C 323) * *

Chicago, Illinois,
Friday, April 22, 1960,
11:00 o'clock a.m.

Court convened pursuant to an adjournment.

Present:

Mr. Thomas C. McConnell,
Mr. John Borst, Jr.,
Mr. Lee A. Freeman,
Mr. John Paul Stevens,
Mr. Herbert B. Lazarus,
on behalf of the Plaintiff;

Mr. Albert J. Meserow,
on behalf of the Defendants John L. Keeshin and Railroad Transfer Service, Inc.;

Mr. Joseph C. Owens,
on behalf of the Defendant Hugh W. Cross;

Mr. Martin J. Keating,
on behalf of the Defendant The New York Central Railroad Company;

80 Mr. Floyd E. Thompson,
Mr. Philip W. Tone,
on behalf of defendant railroads.

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81 And thereupon the following further proceedings were had herein:—

By The Clerk: No. 56 C 323. Parmelee Transportation Company vs. John L. Keeshin, et al. Case on trial.

By Mr. Meserow: Before your Honor makes his ruling, may I make a short statement, please, your Honor?

By The Court: Yes.

By Mr. Meserow: I read in the press this morning about the position of the various lawyers, and I was included with the other lawyers, and I think erroneously.

By The Court: That is exactly what you did. You stepped up, and you said openly that you were going along with your senior counsel, Judge Thompson.

By Mr. Meserow: I didn't say that. I said I would welcome a full dress hearing in order to vindicate the false accusations.

By The Court: The record speaks for itself.

By Mr. Meserow: However, I am in favor of a separate issue trial. I have checked the cases again yesterday after we were here. I talked with my client yesterday, and I want to say this to your Honor, that I say Judge Castle's decision in this circuit is directly in point, and it 82 gives this Court ample atuhority to separate the issues.

I don't know what your ruling is going to be, your Honor.

By The Court: Nobody else does.

By Mr. Meserow: I am in favor of it, and so are my defendants.

By Mr. McConnell: If the Court please, before you make your decision on it, I want to advise the Court we want to file a motion for change of venue in this case.

By The Court: Motion overruled.

By Mr. Freeman: I join in that motion. We have not filed it yet.

By Mr. McConnell: We would like to file it.

By The Court: When you file it, I will consider it.

By Mr. Borst: Your Honor, may I file my appearance for the New York Central?

By The Court: Yes.

As I stated yesterday, I have studied all the briefs, pleadings and transcripts in this case. I have read much

of the law pertaining thereto, especially the numerous decisions that came down since Judge Sullivan ruled on the motions to strike five years ago.

83 It has been worrisome to the Department of Justice, to the Supreme Court of the United States and to the District Courts. Protracted litigation in anti-trust cases has been a subject of frequent discussion, and all are determined to bend every effort to shorten litigation with due regard for the administration of justice.

Although five years old, and the contract in controversy is about to expire, the principal defendant has been trying to continue the matter from time to time until the Court entered an order for immediate trial. Plaintiff's counsel have sought to continue it until the fall, so all the discussion about any delay that may result from an appeal sounds rather weak.

One of the principal arguments before Judge Sullivan as presented in the briefs was the fact that the question of the contracts involved lie strictly within the jurisdiction of the Interstate Commerce Commission. Judge Sullivan ruled against it before those decisions were handed down, but since his ruling our own Court of Appeals in Atchison, Topeka & Santa Fe v. City of Chicago, 240 Fed. 2d 930, and the United States Supreme Court in the same case, 357 U.S. 77, have held that the servicing controversy

84 was under Interstate Commerce Commission jurisdiction and could not be interfered with by the City of Chicago. The plaintiff in this case intervened in those cases and is now bound by that decision.

Since Judge Sullivan's decision, numerous cases have held that private suits under Title 15 U.S.C. are maintainable only when the defendant's conduct has caused some injury to the public generally as distinct from purely personal or private damage.

Even in the Klor case, and I am mindful that it was reversed on the question of the pleadings and affidavits, not on trial, but in Klor vs. Broadway, 255 Fed. 2nd, 233, cited by the plaintiff, the Court held, and I quote:

85 "Where there is no conceivable way in which a substantial segment of the public can be injured by the conduct attacked, the Sherman Act is not violated."

The Court has read all the cases cited by plaintiff's counsel, and with all due regard to them, they have no application to the question in controversy under the above law.

This is a case where public injury must be established as a prerequisite to sustaining the plaintiff's right to recover. Defendants have all agreed that the Court has power to separate the issues as most recently held in Marks Food v. Barbara, 274 Fed. 2d, 934.

This Court has adopted a rule for the separation of issues and is determined to enforce it wherever lawful and proper. It is intended not to expedite litigation

86 only, but to present issues before a jury free from rancor, prejudice and sympathy?

There is a far greater issue involved in this case in not applying this rule. The Court must abandon its determination that public economic injury must be established in this case. Contrary to all the cases cited by the plaintiff, this is the most recent law laid down by our own Seventh Circuit, Radiant Burners vs. People's Gas, 273 F. 2d 196. This Court will follow that law and will enforce it even if it is tried on all the issues.

With all due regard to counsel for the defense, who are very able and industrious lawyers, the Court must reject their determination to vindicate the defendants in a civil matter. I am concerned only with legal propositions.

Furthermore, in the opinion of this Court, if plaintiffs fail to establish public economic injury, the record will remain silent on their vindication.

Most of the cases cited by counsel for the plaintiff refer to the sufficiency of the complaint. The same is true in the case laid down by Judge Castle.

In the case before me, they are being given the
87 opportunity to try the issue before a jury; and if sustained, to proceed with the remaining issues before the same jury.

Accordingly, I now order the parties to proceed on the single issue of public economic injury.

Plaintiff has challenged the power of the Court to enter this order. I accept the challenge. Contrary to plaintiff's arguments, the Court can direct properly the proceedings in a lawsuit before it.

Proceed to trial. Send for a jury.

88 By Mr. McConnell: Your Honor, we are making a motion for change of venue.

By The Court: The motion is denied. The case is on trial.

By The Clerk: It has to be supported by affidavits.

By The Court: The case was called for trial yesterday, and I said it was on trial.

By Mr. Freeman: Are we going to be permitted to file such an affidavit and motion?

By The Court: I am not going to discuss it with you now. You follow your own practice. The case is on trial. I am sending for a jury.

By Mr. McConnell: If the Court please, I would like to make a statement. I don't know whether any purpose is served by—

By Mr. Thompson: The jurors are here.

By Mr. McConnell: I want to speak outside the presence of the jury, your Honor.

By The Court: All right, step in chambers and I will hear you.

(Whereupon the following further proceedings were had herein, in chambers.)

By Mr. McConnell: I made an argument before your Honor yesterday in which I stated that I thought any separate proof or any separate trial of an issue of
89 economics or difference of service between Parmelee and the Keeshin company was an irrelevant issue in this case.

I wasn't just making a captious argument. I was making an argument in which I believed, and on which I was prepared to stand.

Now all I want is the right to make a record here. I don't want to waste the time of jurymen or lawyers or your Honor.

By The Court: Make all the record you want.

By Mr. McConnell: Now here is what we propose if it is acceptable to your Honor.

Any offer of proof that we make, we would have to make outside the presence of the jury anyway. I have no intention of offering any proof other than the conspiracy proof under our complaint.

I am not proposing to offer any proof of the differences in services or the economic injury to the public, the things that your Honor, I take it, has in mind—

By The Court: That is right.

By Mr. McConnell: Because yesterday you said that you were not going to entertain proof of conspiracy or monopoly.

By The Court: Not on this one issue.

90 By Mr. McConnell: No on this one issue.

Now that being so, I just don't want to waste time picking a jury here when I am not going to present any evidence before it.

I would like to make an offer of proof, which I have to make outside the presence of the jury anyway, as I understand it. Isn't that right, Judge Thompson? Isn't that our arrangement, that we will make all offers of proof outside the presence of the jury?

By Mr. Thompson: That is right, Mr. McConnell, as I understand it.

91 By Mr. McConnell: So the question is, do we need to technically impanel a jury here? I will follow your Honor's wishes.

By The Court: I will follow the law on the offer of proof out of the presence of the jury.

By Mr. Freeman: Then should we just take the first twelve men and impanel them, under the understanding that we will excuse the jury and make an offer of proof?

By The Court: Yes, you may do that.

By Mr. McConnell: I suppose you would have to then direct the jury on that issue.

By The Court: I don't see any objection to it.

By Mr. McConnell: Is that all right with you, Judge? Suppose we take the first twelve men that come up?

I am not going to put in any evidence. It will be an offer of proof made outside the presence of the jury.

By Mr. Thompson: Well, I must confess—

By Mr. Meserow: Could we have a little conference?

By Mr. Thompson: Now, just a minute. I don't need any advice.

I must confess that this dealing off the seat of my
92 pants in this fashion is something new to me. I don't know.

Now as I understand your proposal, it is that we put twelve people in the box and swear them as the jury; that you make an offer of proof—

By Mr. Freeman: Which is rejected.

By Mr. Thompson: I don't know that it has been decided that it is rejected. I presume the Court is going to decide these matters as they are presented.

Now, you make your offer of proof. I would anticipate from what the judge has already announced that he would reject your offer of proof, but I certainly can't underwrite it.

Then if your offer of proof is such that we can't accept it is an offer of proof—now, of course, if we object to your offer of proof, I suppose that is sort of like a demurrer, isn't it?

We admit that what you offer to prove is what you can prove, and we say that assuming he proved it, why, he hasn't any basis for it.

Now that is what puts me on the spot because you make your offer of proof—

93 By The Court: No. You make an objection it is contrary to my ruling in this case.

By Mr. Meserow: Not material to the issue of economic injury.

By The Court: Neither admit nor deny, but contrary to the Court's rulings. I intend to stand by those rulings.

By Mr. Thompson: Your offer of proof which you propose to make is not going to incorporate this matter of public injury except that it arises out of any conspiracy?

By Mr. McConnell: Yes, that is my point. That is what I argued. I want the question raised and determined.

By Mr. Thompson: I didn't quite get clear that that is what you argued. I thought I knew what you argued, and I think I still know.

By Mr. Freeman: We will not offer any separate proof on public economic injury.

By Mr. Thompson: I know, but I may have to do some offering of proof. In other words, I may want to offer proof that there is public injury. I don't know why I need to when you are not offering any that there is. I don't know why I have to prove the negative, but I must confess that I am a bit at sea.

94 By The Court: If you want to take time until Monday morning?

By Mr. Thompson: I don't need until Monday morning.

By The Court: 2:00 o'clock?

By Mr. Thompson: 1:00 o'clock.

By The Court: I want this record to be as complete as we know how.

By Mr. McConnell: Now one thing, I have a very dear friend that died, and I have got to go to his funeral at 3:00 o'clock this afternoon. I may not be here.

By Mr. Owens: I want to say something—

By Mr. Thompson: None of us may be.

By The Court: I will say this to you again, I will make it Monday morning.

By Mr. McConnell: Let's make it Monday morning.

By Mr. Owens: Can I say something on this?

By Mr. Thompson: I don't know why we should make it Monday morning. Can't we come back at 1:00 o'clock?

By The Court: 1:00 o'clock is all right.

By Mr. Thompson: And you can make it out to the funeral.

By Mr. McConnell: I have to go out there at 3:00 o'clock, to Wilmette.

By Mr. Thompson: That is quite a ways. If you left here at 2:00 o'clock?

95 By Mr. McConnell: I could make it.

By Mr. Thompson: Suppose we come back by 1:00 and by then maybe I will know what I can do with your proposal. I must confess this is a fast pace.

By Mr. McConnell: I don't think anybody has ever done it before, I will agree with you on that.

By Mr. Thompson: Of course, that doesn't prove it can't be done, I guess, but I am a little old to try new experiments.

96 By Mr. Owens: Judge, this case has been called for trial. The jury demand has been made by the plaintiff. It is that jury which will have to determine whatever issues are going to be tried in this case.

So I don't believe in this just impaneling people, sort of a provisional jury. I think if we pick a jury, it is a jury.

By the Court: I am not recommending it. I am not sanctioning it. I am not disapproving it.

Counsel are very able. They have a right to impanel the jury and make any offer of proof they wish. I welcome it. I want the record to be as complete as is humanly possible. I want Judge Thompson to have the right and you to have the right—

By Mr. Owens: But they don't make a prima facie showing.

By the Court: You represent Mr. Cross?

By Mr. Owens: Yes, sir.

By the Court: And you represent Keeshin and Parmelee.

By Mr. Freeman: Mr. Meserow doesn't represent Parmelee.

By the Court: I mean Keeshin and Railroad Transfer Service.

97 I want the record to be as clear from your point of view. If you want to make a counter offer, you may do so. I intend to stand by my ruling.

This is a separate and distinct issue, and we will rule that any other evidence that is being offered independent and outside of that one issue is irrelevant, immaterial, and not admissible, and improper. I will sustain that objection and will strike it from the record.

By Mr. McConnell: Could we have an order to that effect, a written order, draft order?

By Mr. Thompson: Just a minute—

By the Court: I will write an opinion when you get through with it.

By Mr. Thompson: I say, wait just a minute, now. Then as I understand it, you offer your proof to the jury. You omit to offer any proof on the issue.

By Mr. McConnell: I am not going to offer a bit of proof except on the conspiracy issue.

By the Court: He says he will not offer any proof on the question of public economic injury.

By Mr. Freeman: We are not going to compare Keeshin and Parmelee as to rates, service, or anything else.

By the Court: They will not offer proof on higher rates or service.

By Mr. Thompson: We are going to compare them.

98 By Mr. Owens: If they make no prima facie case, we should make a motion for judgment by default.

By the Court: That will follow next.

By Mr. McConnell: It ends up as a direct verdict.

By Mr. Thompson: It is obvious it will be a directed verdict for the defendants on this issue.

By Mr. McConnell: That is correct, and that is the only issue we can try.

By Mr. Stevens: I think one thing should be made clear, and I would like to understand your Honor's ruling.

By the Court: You mean I haven't made my position clear here?

By Mr. Stevens: Any evidence of conspiracy to eliminate competition for the Transfer Service would be inadmissible?

By the Court: I will make my ruling when you make your offer. I will make the ruling on the offer you make. I stand by my original ruling that we are trying the sole and only issue of public injury as a prerequisite that the plaintiffs try to recover.

99 By Mr. Stevens: What we still don't know is whether evidence of conspiracy is admissible under that ruling?

By Mr. McConnell: We are going to know it when we offer it.

By the Court: You will know it when you offer it and I make my ruling on the offer. I intend to write an opinion when the whole case is terminated one way or the other.

By Mr. Thompson: Is it all right if we meet at 1:00 o'clock?

By Mr. McConnell: What are we going to do at 1:00?

By Mr. Thompson: I should know?

By Mr. McConnell: I want to know if I can get away, that is all.

By Mr. Thompson: I understand what you are going to do is just what you said you were going to do.

By Mr. Meserow: Except for this —

By Mr. Thompson: Wait a minute.

By Mr. Meserow: Can I say something, please?

By Mr. Thompson: All you want to, go ahead.

By Mr. Meserow: It may be that we will want to pick a jury, not just take the first twelve. In which case, we wouldn't be out in time for Mr. McConnell.

By the Court: I haven't prescribed a method of selection of the jury, and I don't propose to. I am not depriving either side of their rights in this case. I am trying a lawsuit.

By Mr. Freeman: May I suggest you recess for a half hour, and possibly Mr. Thompson can decide?

By the Court: I will recess for an hour, to 12:30, or sooner, if you call me.

By Mr. Freeman: All right. That is good enough.

By Mr. Thompson: 12:30 is fine for me, and if the Court isn't going to be engaged during the noon recess —

By the Court: I have nothing else all day.

By Mr. Thompson: Suppose we convene at 12:30 and go ahead with whatever we decide to do? If we decide that we can accept your suggestion, then we can do it and it will be over with pretty quick. If we can't, it will have to go over to Monday.

By Mr. McConnell: I am only trying to save your time.

By Mr. Thompson: I thank you for the kind suggestion.

By the Court: All right, 12:30.

(Thereupon a recess was taken in the hearing of the above-entitled cause to 12:30 o'clock p.m. of the same day, Friday, April 22, 1960.)